No. 93-

AUG 31 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DALE A. SCHREIBER
Counsel of Record
for Petitioners
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3475

Of Counsel:

MINNA SCHRAG
STEVEN B. FEIGENBAUM
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

August 30, 1993

145 PP

QUESTIONS PRESENTED

1. Are the anti-waiver provisions of the Securities Act of 1933 ("1933 Act") and the Securities Exchange Act of 1934 ("1934 Act") violated when American investors in foreign issuers (who have solicited the investors in the United States) are relegated by the enforcement of forum selection clauses in the foreign sponsor's documentation to a foreign forum and foreign substantive law that (a) requires no registration statements (or comparable affirmative pre-investment decision disclosures); (b) clothes the issuers and the sponsor with full immunity from suit; (c) protects from any liability the individual persons owning, controlling, and managing other sponsor-controlled entities that function as broker-dealers and underwriters; and (d) imposes liability upon those entities (all corporate entities with limited liability) only upon proof of fraudulent intent, reliance, and causation, proof not required for claims under Sections 12(1) and 12(2) of the 1933 Act or Rule 10b-5?

2. May the anti-waiver provisions of the 1933 and 1934 Acts, which contain no exceptions for foreign sponsors, issuers, underwriters, broker-dealers, and their respective controlling persons, be construed to allow an implied exemption under which such foreign parties—but not their domestic counterparts—can by contract exempt themselves from compliance with the substantive regulatory and remedial provisions of the 1933 and 1934 Acts?

3. Does the resulting loss of remedial opportunities under the Acts constitute a waiver of "essential features" of private damage remedies under the Acts, thereby violating the anti-waiver provisions in the terms contemplated by *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 481 (1989)?

LIST OF PARTIES

1)	Petitioners (Plaintiff-Appellants below):	Listed in Appendix A
2)	Respondents (Defendant-Appellees below):	Listed in Appendix B
3)	Plaintiffs below not seeking review:	Richard J. Kissel

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND REGULATIONS INVOLVED 3

STATEMENT OF THE CASE 5

A. The Parties 5

B. Petitioners' Claims 5

C. Proceedings in the District Court 7

D. Proceedings in the Court of Appeals 9

REASONS FOR GRANTING THE PETITION 11

CONCLUSION 23

APPENDICES

Appendix A: List of Petitioners

Appendix B: List of Respondents

Appendix C: Second Circuit Opinion
Dated June 2, 1993

Appendix D: District Court Opinion and Order
Dated June 12, 1992

Appendix E: District Court Memorandum Opinion
and Order
Dated August 18, 1992

Appendix F: Second Circuit Judgment
Issued June 2, 1993

Appendix G: District Court Opinion
Leslie v. Lloyd's,
No. H-90-11909 (S.D. Tex.)
Dated September 4, 1991

Appendix H: Article
PRIVATE EYE
Lloydy Luck, p. 28
Dated July 2, 1993

Appendix I: Article
INVESTMENT DEALERS' DIGEST
Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*, p. 16
Dated November 9, 1992

Appendix J: Article
THE NEW YORK TIMES
Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*,
Section D, p. 1, col. 3
Dated March 25, 1993

Appendix K: Article
INVESTMENT DEALERS' DIGEST
Hal Lux, *SEC Commissioner Proposes Foreign Listing Mechanism*, p. 12
Dated May 29, 1993

TABLE OF AUTHORITIES

CASES

Allied Artists Pictures Corp. v. Giroux,
312 F. Supp. 450 (S.D.N.Y. 1970) 15

Bonny v. Society of Lloyd's,
784 F. Supp. 1350 (N.D. Ill. 1992) 20

Bonny v. The Society of Lloyd's,
Nos. 92-1662, 2771, 1993 U.S. App.
LEXIS 20145 (7th Cir. Aug. 5, 1993) 20

Haralson v. E.F. Hutton Group, Inc.,
919 F.2d 1014 (5th Cir. 1990) 15

Hugel v. Corporation of Lloyd's,
No. 92-2240, 1993 U.S. App. LEXIS
17106 (7th Cir. July 8, 1993) 20-21

Leslie v. Lloyd's of London,
No. H-90-1907 (S.D. Tex. Sept. 4, 1991) 19

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 20

Pinter v. Dahl,
486 U.S. 622 (1988) 16, 18

Pryor v. United States Steel Corp.,
794 F.2d 52 (2d Cir.), *cert. denied*,
479 U.S. 954 (1986) 15

Riley v. Kingsley Underwriting Agencies, Ltd.,
969 F.2d 953 (10th Cir.), *cert. denied*,
___ U.S. ___, 113 S.Ct. 658 (1992) 9, 19

Roby v. The Corporation of Lloyd's,
796 F. Supp. 103 (S.D.N.Y. 1992) 2

Roby v. The Corporation of Lloyd's,
[1992 Transfer Binder]
Fed. Sec. L. Rep. (CCH) ¶ 96,971,
at 94,164 (S.D.N.Y. Aug. 18, 1992) 2

Roby v. The Corporation of Lloyd's,
[1992-1993 Transfer Binder]
Fed. Sec. L. Rep. (CCH) ¶ 97,458,
at 96,555 (2d Cir. June 2, 1993) 2

Rodriguez de Quijas v. Shearson/Am. Exp.,
490 U.S. 477 (1989) . . . . . *passim*

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) . . . . . *passim*

Schine v. Schine,
254 F. Supp. 986 (S.D.N.Y. 1966) 15

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 16

Special Transp. Serv., Inc. v. Balto,
325 F. Supp. 1185 (D. Minn. 1971) 11, 15

Wilko v. Swan,
346 U.S. 427 (1953) 9

STATUTES

9 U.S.C. §§202-208 9

Securities Act of 1933, Section 5(a),(b)
15 U.S.C. §§77e(a),(b) 16, 17, 19

Securities Act of 1933, Section 12(1)
15 U.S.C.§77*l*(1) . . . . . *passim*

Securities Act of 1933, Section 12(2)
15 U.S.C.§77*l*(2) . . . . . *passim*

Securities Act of 1933, Section 14
15 U.S.C. §77n 3, 8

Securities Act of 1933, Section 15
15 U.S.C. §77o 5

Securities Act of 1933, Section 22
15 U.S.C. §77v 2

Securities Exchange Act of 1934, Section 20(a)
15 U.S.C. §78t(a) 5

Securities Exchange Act of 1934, Section 27
15 U.S.C. §78aa 2

Securities Exchange Act of 1934, Section 29(a)
15 U.S.C. §78cc(a) 3, 8

Organized Crime Control Act of 1970, Section 1964(c)
18 U.S.C. §1964(c) 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

SECURITIES AND EXCHANGE COMMISSION REGULATIONS

Regulation D
17 C.F.R. §§230.501-508 17

17 C.F.R. §230.501(a) 17

17 C.F.R. §§230.502(a)-(c) 17

Rule 10b-5
17 C.F.R. §240.10b-5 . . . . . *passim*

CONVENTIONS

The United Nations Convention On Contracts For The International Sale Of Goods, 19 I.L.M. 671 (April 11, 1980) 9

The United Nations Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (as adopted and codified, 9 U.S.C. §§201-208) 8-9

LAW REVIEW PUBLICATIONS

Kristine Paden, Note, *Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 450-460 (1993) 19

OTHER PUBLICATIONS

Lloydy Luck, PRIVATE EYE, July 2, 1993, at 28 22

Hal Lux, *SEC Commissioner Proposes Foreign Listing Mechanism,* INVESTMENT DEALERS' DIGEST, May 29, 1993, at 12 12

Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993, § D, at 1, col. 3 12

Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?,* INVESTMENT DEALERS' DIGEST, November 9, 1992 at 16 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
No. **93-**

JOHN S. ROBY, et al.,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

John S. Roby and the 109 other appellants (listed in Appendix A) petition for a writ of certiorari to review a decision and judgment of the United States Court of Appeals for the Second Circuit. In the face of the anti-waiver provisions of the 1933 and 1934 Acts, that decision enforces pre-dispute forum selection and choice-of-law clauses that relegate American investors' claims to English tribunals to be adjudicated under English substantive law, thereby depriving the investors of all their rights under the 1933 and 1934 Acts. The practical consequence of the Court of Appeals' application of the anti-waiver provisions is to permit foreign companies that raise capital from American investors through direct solicitations in the United States to escape, by the terms of standard form contracts, all civil damage liability under the Acts.

OPINIONS BELOW

The decision of the Court of Appeals affirming the judgment and orders of the District Court on the basis of the forum selection clauses is reported at [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,458 at 96,555 (2d Cir. June 2, 1993) (Appendix C). The decision of the District Court dismissing the complaints against the syndicate defendants is reported at 796 F. Supp. 103 (S.D.N.Y. 1992) (Appendix D), and its decision dismissing the complaint as to the remaining defendants on the basis of the forum selection clauses is reported at [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,971 at 94,164 (S.D.N.Y. Aug. 18, 1992) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals (Appendix F) was entered on June 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction in the District Court was based on Section 22 of the 1933 Act (15 U.S.C. §77v), Section 27 of the 1934 Act (15 U.S.C. §78aa), and Section 1964(c) of the Racketeer Influenced Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (18 U.S.C. §1964(c)) ("RICO"), which separately confer federal jurisdiction over suits brought to enforce liabilities arising under these respective statutes. Jurisdiction in the Court of Appeals was based on 28 U.S.C. §1291.

STATUTES AND REGULATIONS INVOLVED

1933 Act, §14 (15 U.S.C. §77n):

§77n. Contrary stipulations void

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

1934 Act, §29(a) (15 U.S.C. §78cc(a)):

§78cc. Validity of contracts

(a) Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

1933 Act, §12(1) and §12(2) (15 U.S.C.§77*l*(1)-(2)):

§77*l* Civil Liabilities arising in connection with prospectuses and communications

Any person who—

(1) offers or sells a security in violation of section 77e of this title [Section 5 of the 1933 Act prohibiting the offering and sales of non-exempt unregistered securities in non-exempt transactions], or

(2) offers or sells a security (whether or not exempted by the provisions of 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate

commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Securities and Exchange Commission ("SEC") Rule 10b-5 (17 C.F.R. §240.10b-5):

Employment of manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

STATEMENT OF THE CASE

A. The Parties

Petitioners, the plaintiffs below, are known as Names at respondent The Corporation of Lloyd's ("Lloyd's"). They sued Lloyd's, its governing boards (the Committee and the Council), 328 Lloyd's-sponsored insurance syndicates (identified by their respective syndicate numbers at Lloyd's), the Member's Agents that were responsible for representing petitioners' interests in connection with their investments in the syndicates, the Managing Agents that managed the affairs of the syndicates, and the Member's and Managing Agents' respective controlling persons, for violations of Sections 12(1), 12(2) and 15 of the 1933 Act, Rule 10b-5 promulgated under the 1934 Act, Section 20(a) of the 1934 Act, and the civil liability provisions of RICO.

B. Petitioners' Claims

Petitioners allege that their investments in Lloyd's-sponsored syndicates constituted the purchases of "securities" within the meaning of the 1933 and 1934 Acts and that the syndicates were suable under those acts as "issuers" of the securities. For purposes of its decision, the Court of Appeals adopted petitioners' contentions (Appendix C, 7c, 10c).

Specifically, petitioners allege that respondents raised over $1 billion in American capital for the syndicates through systematic solicitations of American investors in the United States.[1] Petitioners allege that the solicitations and sales of interests in Lloyd's-sponsored syndicates occurred without the required registration of these

---

[1] The respondent syndicates (and many other Lloyd's-sponsored syndicates) have carried on substantial insurance business in the United States. At the time petitioners' complaint was filed, the Lloyd's American Trust Fund held more than $9 billion for the syndicates' accounts at Citibank, N.A. in New York City (Appendix D, 19-20d). These funds are subject to Lloyd's control.

offerings or other adequate pre-investment decision disclosures to prospective investors.

Actionable misrepresentations and nondisclosures alleged by petitioners include the syndicates' material undisclosed liabilities for "long-tail" asbestos, pollution, and professional liability risks undertaken in syndicate years of account[2] long before the years for which petitioners were investors. These undisclosed liabilities arose from "reinsurance to close" transactions by which the syndicates assumed one or more previous years' liabilities. The inadequacies of the "reinsurance to close" premium payments assured that investors in the same syndicate for succeeding years would incur substantial losses from these transactions.

Petitioners also allege that there was no disclosure of the huge liabilities that some syndicates assumed by taking on reinsurance risks generated by the recently well-publicized "LMX spiral." The "LMX spiral" refers to the practice by which a group of London-based insurance brokers (and Managing Agents) would pass responsibility for reinsuring catastrophic risks (such as damage from hurricanes and earthquakes) from syndicate to syndicate, until the risks were finally lodged back with the syndicates that had ostensibly obtained reinsurance for the risks they had originally accepted. In this manner, the "LMX spiral" concealed from investors in these syndicates the failure of the Managing Agents to spread risk through bonafide reinsurance. Each time the "reinsurance" was passed from

---

[2] Lloyd's syndicates operate on separate calendar years of account. For each year, with the advice of their respective Member's Agents, Names make annual investment decisions about the syndicates in which they will invest, and to what extent. Names' investments are represented in part by deposits in the form of cash, securities, or letters of credit held by Lloyd's for the syndicates. Names also assume unlimited personal liability for their pro rata share of all syndicate losses for each year in which they are investors. As a result, Names are exposed to losses far in excess of the amounts of their original deposits.

syndicate to syndicate, the brokers and Managing Agents collected substantial commissions.

Petitioners allege that collectively they sustained millions of dollars of losses[3] as a result of respondents' violations of the federal securities laws. Lloyd's has publicly reported aggregate losses of more than $9.1 billion for its last three reported years of account (1988, 1989 and 1990).[4]

C. Proceedings in the District Court

The District Court dismissed petitioners' consolidated amended complaint without ruling on the merits of their claims under the federal securities laws.

The District Court first ruled that the syndicates—concededly not jural entities suable under English law—were by virtue of that fact

---

[3] Petitioners' losses include seizure of their deposits by Lloyd's, as well as Lloyd's demands that they pay uncollateralized losses and, in some cases, make working capital advances. Lloyd's has demanded payments from most petitioners that are multiples of their original deposits. Some petitioners and other American Names have been sued in London for those demands.

Most petitioners (like other American Names) have no assets in the United Kingdom and, therefore, once American Names' deposits are seized, Lloyd's must seek to enforce any English judgments that it obtains against the Names by separate enforcement proceedings in the United States. Lloyd's need for ultimate recourse to American courts to enforce English judgments makes all the clearer that application of the forum selection and choice-of-law clauses results in a prohibited waiver of petitioners' rights under the 1933 and 1934 Acts. For, in those enforcement proceedings, Lloyd's will assert that the American Names' defenses and counterclaims under the 1933 and 1934 Acts are barred by those clauses.

[4] Lloyd's syndicates report three years in arrears for a given year of account. Thus, 1989 results were not announced until 1992, and 1990 results were not announced until 1993. Similarly, 1991 and 1992 results are as yet not publicly disclosed.

alone not suable as "issuers" under the 1933 or 1934 Act (Appendix D).

The District Court later ruled that the forum selection clauses in Lloyd's standard documentation (Lloyd's General Undertaking with each of the Names, as well as the Lloyd's-mandated forms of agreement between Names and their Member's Agents and between the Member's Agents and the Managing Agents of the syndicates) should be specifically enforced to effect a dismissal of this action (Appendix E). The dismissal forces petitioners to forgo their claims or litigate them against respondents, to the limited extent possible under English law, in such judicial and arbitral forums of England as are appropriate under English rules and under English substantive law.

The District Court dismissed petitioners' complaint even though it was undisputed that English choice-of-law rules preclude recognition of any foreign tort claims, whether common law or statutory. English substantive law provides remedies against only some classes of respondents (others being subject to immunities or unchallengeable legal defenses). Even as to those suable classes of respondents, English law imposes liability only under theories that are fault- and causation-based and therefore more difficult and expensive to establish than claims under the federal securities laws. The District Court rejected petitioners' contention that enforcement of the forum selection clauses, in tandem with the choice-of-law clauses, violates the anti-waiver provisions of Sections 14 of the 1933 Act and 29(a) of the 1934 Act. It reasoned that no prohibited waiver exists so long as *some* remedies against *some* respondents are theoretically available in England under English law.

The District Court based enforcement of the forum selection clauses on the belief that this Court's opinion in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) "controlled" and required, in virtually any case involving a "truly international" transaction, that forum selection clauses be rigorously enforced. The District Court found further support for its conclusion by reference to the *United*

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (as adopted and codified, 9 U.S.C. §§201-208) ("the UN Convention"), which it believed to be applicable.

D. Proceedings in the Court of Appeals

Although it affirmed the District Court's judgment insofar as it enforced the forum selection clauses, the Court of Appeals disavowed the District Court's reasoning and spotlighted the important issues raised by this petition.

The Court of Appeals did *not* apply the UN Convention, declaring that its application to securities transactions was uncertain, presumably because four Justices dissenting in *Scherk* found the Convention inapplicable (417 U.S. at 526-527), while the five-Justice majority declined to decide its applicability (417 U.S. at 520, n.15) (Appendix C, 19-20c, n.2).[5] The Court of Appeals stated that neither *Scherk* nor any other decision of this Court was controlling

---

[5] The UN Convention, although adopted by 25 nations on June 7, 1959, was not acceded to by the United States until September 30, 1970 and then with the express reservation that it applied only to "commercial relationships" (9 U.S.C. §202). It is most unlikely that Congress intended to make private damages claims under the 1933 and 1934 Acts arbitrable under the UN Convention. In 1958 (at the time of the Convention's promulgation) and in 1970 (at the time of American accession), *Wilko v. Swan*, 346 U.S. 427 (1953), and Court of Appeals decisions after *Wilko*, applied the anti-waiver provisions to bar any arbitration of these claims. The conclusion that sales of securities are not "commercial" within the meaning of the UN Convention or the American accession legislation is reinforced by the *United Nations Convention on Contracts for the International Sale of Goods*, 19 I.L.M. 671, 672 (April 11, 1980). Article 2(d) of Part I of that convention provides that it "does not apply to sales: * * (d) of stocks, shares, investment securities, negotiable instruments or money * *."

and rejected the District Court's and the Tenth Circuit's[6] use of the shibboleth "truly international" as a litmus test for enforcing the forum selection clauses (Appendix C, 18-19c). Instead, referring to policies reflected in the anti-waiver provisions, the Court of Appeals found that "there [was] a serious question whether United States public policy has been subverted by the Lloyd's clauses." (Appendix C, 21c)

Although clearly in error on some important specifics of English law, the Court of Appeals nonetheless correctly concluded that "the United States securities laws would provide the [petitioners] with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements * *" as compared to their chance of success under relevant English law (Appendix C, 27c).

The Court of Appeals then proceeded to adopt a novel standard for enforcing the anti-waiver provisions. In its view, the impairment of petitioners' substantial rights and remedies, in itself, was not sufficient to violate the anti-waiver provisions. It held that petitioners bore the burden of showing that the foreign remedies available to them were "insufficient to deter [foreign] issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure * *" (Appendix C, 24c). The Court of Appeals found that petitioners failed to meet its newly announced standard.[7]

---

[6] See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992).

[7] That standard is essentially impossible to satisfy. How could private plaintiffs realistically be expected to gather data showing that any defendants were influenced to make more or less pre-investment financial disclosure by differences in the liability standards of American and English law? And what group of potential defendants would be targeted for such an inquiry—those with immunity or equivalent defenses

(continued...)

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' application of the anti-waiver provisions of the 1933 and 1934 Acts, even accepting its inaccurate conclusions about the nature and extent of petitioners' rights and remedies under English law, creates a significant loophole in the protection afforded to American investors in securities offered and sold by foreign issuers and their agents. That loophole violates the plain meaning of the anti-waiver provisions.

A. The decision creates an implied exception to the anti-waiver provisions in favor of foreign-based sellers of securities, when in fact Congress has provided no such exception.[8]

B. The decision creates that exception at a time when more than 890 foreign public companies have listed American Depositary Receipts (ADR's) for trading their securities on American stock exchanges and over-the-counter markets, and foreign issuers are seeking direct listings of their securities on American stock exchanges. See Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*,

---

[7](...continued)
under English law, those with potential exposure, or both, and with what relative weight given to each group? In the light of these inquiries made relevant by its test, the Court of Appeals' test can be fairly said to require undisciplined speculation about potential defendants' behavioral propensities.

[8] Presumably, for example, that the Court of Appeals would not permit a domestic issuer to enforce a provision in its stock subscription agreements that requires the purchasers to sue only under some state law that provides a higher threshold for issuer liability or a lesser measure of damages than those provided by the 1933 and 1934 Acts. See, *e.g.*, *Special Trans. Serv., Inc. v. Balto*, 325 F. Supp. 1185, 1187 (D. Minn. 1971) (limitation of liability provision unenforceable under §29(a) of the 1934 Act); see also the cases cited in subsection II(B) below.

INVESTMENT DEALERS' DIGEST, Nov. 9, 1992, at 16 (Appendix I).[9] The Court of Appeals' ruling removes policy decisions regarding disclosure requirements for foreign issuers from the SEC. It allows foreign issuers to create their own disclosure rules through standard form contracts by which American investors waive their rights under the 1933 and 1934 Acts.

C. This discrimination in favor of foreign issuers and promoters places American issuers at severe competitive disadvantages. American issuers remain subject to risks for non-compliance with registration and disclosure requirements, and must incur the expense of compliance. By contrast, their foreign counterparts may eliminate both the risk of non-compliance and compliance expense, simply by using standard form contracts that purport to comply with the Court of Appeals' new standard for escaping the anti-waiver provisions. Congress has not authorized such an uneven playing field to the great detriment of American business.

D. By promoting full and fair disclosure, the federal securities laws were intended to protect American capital resources, irrespective of the nationality of the parties seeking to raise capital in

---

[9] For example, New York Stock Exchange Chairman William Donaldson has been vigorously advocating direct listings of foreign issuers under financial disclosure rules less stringent than those imposed on domestic issuers, despite the opposition of former SEC Chairman Richard C. Breeden. *Ibid.* Before his resignation, Mr. Breeden attempted to negotiate conditions for compliance with SEC disclosure rules that would apply to a direct listing of the German automobile manufacturer Daimler-Benz, A.G. on the New York Stock Exchange. See Floyd Norris, *Daimler-Benz Is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993, §D, at 1, col. 3 (Appendix J). Unlike former Chairman Breeden, SEC Commissioner Richard Roberts has urged a mechanism for listing securities of foreign issuers that would dilute for these foreign issuers the disclosure requirements applicable to American issuers. See Hal Lux, *SEC Commissioner Prepares Foreign Listing Mechanism*, INVESTMENT DEALER'S DIGEST, May 24, 1993, at 12 (Appendix K).

the United States, from exploitation and misallocation. By creating for foreign issuers a judicial exception to that policy, the Court of Appeals has frustrated the flow of that necessary investment information.

E. The Court of Appeals' decision has ratified Lloyd's policy of refusing to make disclosure to American Names of material information regarding the secretive operations of Lloyd's syndicates.[10] Moreover, the Court of Appeals has created such a special Lloyd's exemption based on a misunderstanding of English law (see footnotes 11 and 16), and on the speculative and unsupportable assertion that English law creates adequate incentives for disclosure and deterrents against investor exploitation. In fact, the inadequacy of any such incentives is demonstrated by the fact that the American Names were not given the disclosures to which they would have been entitled under American law. The speculation that such incentives might exist cannot be credited where English law provides Lloyd's and its governing councils with statutory immunity, holds the syndicates not to be suable as jural entities (despite their economic and operational separateness and the fact that they hold most of Lloyd's total capital),[11] effectively denies "controlling person"

---

[10] This policy includes providing, as the principal form of pre-investment decision disclosure, the uninformative, one-page "syndicate lists," which disclose only the extent of the Names' projected participation in specified syndicates. The syndicate lists do not disclose such material risks as the syndicates' massive "long-tail liabilities" for previous years of account or the syndicates' involvement in the "LMX spiral."

[11] The Court of Appeals' treatment of the syndicates assumes that the syndicates are suable as "issuers" under the federal securities laws (Appendix C, 7c), but fails to note that they are not suable under English law (Appendix C, 24-27c). Thus, the Court of Appeals' analysis skips over pertinent questions raised by its own novel analysis: Under English law, what incentive for issuer-based disclosure can there be when the issuers, as the principal repositories of Lloyd's capital, are themselves not suable? Is there incentive for disclosure when substantial

(continued...)

liability, and limits petitioners to fault- and causation-based remedies against certain limited liability entities.

II. The Court of Appeals' construction of the anti-waiver provisions of the 1933 and 1934 Acts is inconsistent with this Court's analysis of those provisions in *Rodriguez* and with other decisions from the lower courts.

A. In *Rodriguez*, Justice Kennedy, speaking for a five-judge majority, wrote that the anti-waiver provisions did *not* invalidate arbitration clauses in agreements between registered broker-dealers and their customers because, among other things, the customers retained in arbitration their substantive rights and remedies under the Act, and because the Act's choice-of-forum (venue) provisions did not constitute "essential features" of either Act (490 U.S. at 481). He stated that the impairment of an "essential feature" would be "bar[red]" by the anti-waiver provisions "properly construed * *" (*Ibid.*). He identified one such "essential feature" as "the provision [in Section 12(2) of the 1933 Act] placing on the seller the burden of proving lack of scienter when a buyer alleges fraud * *" (*Ibid.*).[12]

The impairment of petitioners' remedial opportunities caused by their relegation to English law and English tribunals is far greater than a shift in the burden of proof on a single element of a claim under Section 12(2) of the 1933 Act. Here, (i) central defendants — Lloyd's and its governing bodies — are not subject to liability at all; (ii) the syndicates are not suable, and judgments cannot be enforced

---

[11](...continued)
syndicate assets are maintained in the $9 billion Lloyd's American Trust Fund located in the United States, but suit can only be brought in England, where Lloyd's trust funds are not subject to legal process?

[12] Presumably, the four dissenting Justices, who would have invalidated the arbitration clauses under the anti-waiver provisions, would have accepted the majority's view on this narrow point.

against syndicate assets; (iii) failure to register claims under Section 12(1) of the 1933 Act are not recognized; (iv) "controlling person" liability does not exist; and (v) liability against the limited liability entities (Member's Agents and Managing Agents) is fault-based and requires proof of fraudulent intent, together with reliance and causation, or at least the latter two elements.

B. The Court of Appeals' analysis and conclusion are inconsistent with lower court decisions that have found impermissible waivers of "compliance with *any* provision" or "*any* rule and regulation" of the SEC under the anti-waiver provisions, by reason of the contractual impairment of investor rights or remedies available under the 1933 and 1934 Acts. (Emphasis added.) *See, e.g., Pryor v. United States Steel Corp.*, 794 F.2d 52, 56 (2d Cir.), *cert. denied*, 479 U.S. 954 (1986) (contractual waiver of proration rights under Section 14(d)(6) of the 1934 Act is invalid); *Special Transp. Serv., Inc.*, 325 F. Supp. at 1187 (contractual limitations on damage remedy is void); *Allied Artists Pictures Corp. v. Giroux*, 312 F. Supp. 450, 451 (S.D.N.Y. 1970) (director may not limit, by a release instrument, his prospective liability for short-swing profits under Section 16(b) of the 1934 Act); *Schine v. Schine*, 254 F. Supp. 986, 988 (S.D.N.Y. 1966) (prospective release of claims arising under the 1934 Act would be void); *cf. Haralson v. E.F. Hutton Group, Inc.*, 919 F.2d 1014, 1034 (5th Cir. 1990) (anti-waiver provisions "void waivers of rights * * ").

C. As explained further in subsections II(D)-(F), the Court of Appeals' construction of the phrase "waive compliance" in the anti-waiver provisions is inherently unreasonable and self-contradictory. Its construction is based upon the implicit assumption that "waive compliance" means that the challenged contracts expressly authorize non-conformity with the transactional conduct mandated by the Acts (in this case, registration and other pre-investment decision disclosure), irrespective of the degree to which investor rights and remedies under the Acts are actually impaired by application of choice of forum and choice of law clauses in those contracts. But, as stated

in the *Rodriguez* dictum (subsection II(A)) and as the lower court cases applying the anti-waiver provisions illustrate (subsection II(B)), the anti-waiver provisions outlaw *any* material dilution of investors' substantive rights or remedies arising under the Acts—without imposing upon investor plaintiffs undue burdens of proof or persuasion.[13]

D. As applied to petitioners' claims under Section 12(1) of the 1933 Act, the Court of Appeals' construction of the phrase "waive compliance" stands the anti-waiver provisions on their heads: it approves routine enforcement of clauses in foreign issuers' contracts that purport to waive all investor rights under that "provision."[14] The transactional conduct (as opposed to the remedial obligations) mandated by Section 12(1) of the 1933 Act are the filing of registration statements and the delivery of the required prospectuses to investors in advance of their purchases of securities, all in conformity with Sections 5(a) and (b) of the 1933 Act (15 U.S.C. §77e(a),(b)). It is undisputed that English courts categorically refuse to recognize any Section 12(1) claims, and English law provides no equivalent registration obligation or remedy for failure to register.

---

[13] The cases cited above require an objective test for ascertaining whether there has been a prohibited waiver. This Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) assumed as much when it stated:

> The voluntariness of the agreement is irrelevant to [the] inquiry: if a stipulation waives compliance with a statutory duty, it is void under §29(a) [of the 1934 Act], whether voluntary or not.

The Court of Appeals' decision here, while positing an apparently objective test, in practice would require a highly speculative and wide-ranging empirical inquiry. The virtual impossibility of satisfying the test effectively repeals the anti-waiver provisions. See footnote 7.

[14] This Court has recognized that the "registration requirements are at the heart of the [1933] Act, and §12(1) imposes strict liability for violating those requirements," which it described as "a particularly important enforcement tool . . ." *Pinter v. Dahl*, 486 U.S. 622, 636 (1988).

Thus, the relegation to English tribunals and English law resulting from enforcement of Lloyd's forum selection clauses removes any inducement to comply with Section 12(1)'s requirements.[15]

E. The Court of Appeals' construction of the "waive compliance" phrase is equally wrong with regard to petitioners' claims under Section 12(2) of the 1933 Act and Rule 10b-5. The Court of Appeals found that enforcement of Lloyd's forum selection clauses materially impaired petitioners' "chance of success" on these claims (Appendix C, 27c), because certain classes of "deep-pocket" defendants were not suable under English Law (Lloyd's, its governing bodies, the syndicates, and the controlling persons of the Member's Agents and Managing Agents) and because only the fault- and causation-based liability standards were applicable to those limited-

---

[15] The Court of Appeals' rejection of the Section 12(1) claims is not supported by its own test for applying the phrase "waive compliance" (Appendix, 26c). Instead, the Court of Appeals suggested that there were substantive flaws in petitioners' Section 12(1) claims. It observed that the SEC had not required Lloyd's syndicates to file registration statements under Section 5 of the 1933 Act, based on the exemption provided by the SEC's Regulation D (17 C.F.R. §§230.501-508) (Appendix, 26c). The Court of Appeals was procedurally wrong in treating this issue on the merits without a full record and prior notice to petitioners. It was substantively wrong as well, ignoring that the Regulation D limits the exemption by several tests that Lloyd's fails to meet: by limiting the permitted number of "unaccredited investors" participating in the "offering" (17 C.F.R. §230.501(a)); by requiring "unaccredited investors" to be furnished with adequate pre-investment decision information (17 C.F.R. §230.502(b)); by denying exemption to an "offering" that is "integrated" with related "offerings" (*e.g.*, offerings by the same Lloyd's syndicates through different Member's Agents that, when evaluated on an "integrated" basis, fail to comply with Regulation D) (17 C.F.R. §230.502(a)); and by denying exemption where there has been a "general solicitation" (17 C.F.R. §230.502(c)). The Court of Appeals recognized that Lloyd's minimum net worth and earning-power requirements for most investors do not conform to the SEC minimum requirements for "accredited investor" status under Regulation D (Appendix C, 9c).

liability entities that remained suable under English law (Member's Agents and Managing Agents). That finding, without more, should have triggered the anti-waiver provisions to make the Lloyd's forum selection clauses unenforceable. By contrast, the Court of Appeals' test allows routine enforcement of foreign selection clauses merely if the investor *may* have *some* remedy against *some* defendant in the foreign tribunal under the foreign law, irrespective of the diminution of the investors' practical ability to obtain meaningful redress.[16]

F. The Court of Appeals' test violates the plain meaning of Section 12 of the 1933 Act, the "provision" that affords express remedies to aggrieved purchasers of securities. Section 12 provides for statutorily-mandated consequences when "sellers" of securities, as defined in the broad sense contemplated by the statute (*see, e.g., Pinter v. Dahl*, 486 U.S. 622 (1988)), violate either subsection 1 or 2. Those subsections state that such "sellers" "shall be liable" to the aggrieved purchasers. The Court of Appeals has substituted the phrase "may or may not be liable under foreign law prescribed by the seller's contract" for the phrase "shall be liable." In relieving the respondent "sellers" of their statutorily-mandated obligations, the

---

[16] In attempting to identify applicable English substantive rules, the Court of Appeals failed to understand the proper "pecking order" at Lloyd's. It fastened on the contractual disclosure obligations of the Member's Agents to the Names as the linchpin for its finding that there was an adequate foreign remedy and inducement to comply with the disclosure mandates of the 1933 and 1934 Acts (Appendix C, 26c). However, the Member's Agents are in reality brokers matching Names with syndicates. They do not have the control over the issuers—here the syndicates, which are managed and controlled by their respective Managing Agents—to command disclosure of negative information. Insofar as the Court of Appeals intimated that the Managing Agents had direct disclosure obligations to Names, it misread §4.2(j) of the Managing Agent's Agreement. That provision calls for direct disclosure only if the Name's interests in a particular syndicate are not represented by a Member's Agent.

Court of Appeals has enabled respondents to "waive compliance" with their obligations to petitioners under Section 12.[17]

III. Issues raised by other cases involving American Names would be resolved by granting of the writ in this case.

A. The Tenth Circuit's decision in *Riley*, 969 F.2d at 953, was the first of the recent cases involving American Names. The Name's petition for review was rejected by this Court (113 S.Ct. at 658).[18] However, the arguments made here about the effect of the anti-waiver provisions and the inadequacies of English law were not made there. In addition, the Court of Appeals here expressly "depart[ed]" (Appendix C, 21c) from *Riley*, finding its analysis unsatisfactory.

B. In *Leslie v. Lloyd's of London*, No. H-90-1907, slip op. (S.D. Tex. Sept. 4, 1991) (Appendix G), the District Court refused to enforce Lloyd's forum selection clauses. It reasoned that there was

---

[17] Differences in the texts of Rule 10b-5 and Section 12 are not material. First, Rule 10b-5 is formulated in almost identical terms to Section 5 of the 1933 Act ("It shall be unlawful * *."), which in turn is incorporated into Section 12(1) of the 1933 Act. Second, since this Court has consistently construed Rule 10b-5 and Section 12(2) of the 1933 Act *in pari materia* to harmonize the panoply of private remedies available under the federal securities laws, differences in form, as opposed to substance, are treated as irrelevant. See *Rodriguez*, 490 U.S. at 484-85. Third, the interests of judicial economy would be disserved if only some, but not all, of petitioners' securities act claims were assertable in the United States.

[18] *Riley's* reasoning was criticized, and review of the issues raised there was urged, in a recent law review note. See Kristine Paden, Note, *Choice of Forum, Choice of Law, and Arbitration Clauses Override U.S. Security Rights: Riley v. Kingsley Underwriting Agencies, Ltd.*, 6 TRANSNAT'L LAW. 431, 450-460 (1993).

no controlling decision of this Court and that therefore the four-Justice dissent in *Scherk* provided the soundest approach to the issue.

C. In *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992), the District Court overruled a magistrate judge's recommendation that the Lloyd's forum selection clauses be held unenforceable under footnote 19 of this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). There, this Court stated that, if "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies [there, for antitrust violations], we would have little hesitation in condemning the agreement as against public policy" (784 F. Supp. 1354-60). In *Bonny*, the District Court, like the District Court here, believed *Scherk* to be controlling and found the footnote 19 test inapplicable, for the question-begging reason that enforcement of the forum selection clause resolves potential conflicts-of-law problems[19] (784 F. Supp. at 1353-54). On August 5, 1993, the Seventh Circuit affirmed the District Court's judgment, adopting a combination of the District Court's reasoning in that case and the Second Circuit's reasoning in this case. *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 2771, 1993 U.S. App. LEXIS 20145, at *15-21 (7th Cir.

---

[19] Although the desire for predictability in international transactions (and particularly the wish to eliminate conflict-of-law issues) is a relevant consideration in some cases, this desire is a neutral factor when the anti-waiver provisions are considered. If the anti-waiver provisions are enforced, the forum selection and choice-of-law clauses must be invalidated. The result leads to a state of predictability: foreign issuers soliciting American investors are subject to the requirements of, and are subject to suit for failure to comply with their obligations under, the 1933 and 1934 Acts. Thus, the policy choice is not between upholding or defeating predictability in international transactions, but simply whether American investors will or will not retain their rights and remedies under the federal securities laws.

August 5, 1993).[20] Counsel for the *Bonny* plaintiffs has advised us that they will file a petition seeking review by this Court of the Seventh Circuit's decision.

IV. The SEC, the agency charged with enforcement of the federal securities laws, has not acted to protect American Names or to address any of the larger issues raised by the Court of Appeals' decision. Its default in this regard warrants the granting of the writ and plenary consideration by this Court of the issues presented by this petition.

A. While discreetly criticizing the SEC for providing "little guidance", at least on some aspects of the case, (Appendix C, 11c), the Court of Appeals implied that the SEC's default weighs against petitioners' efforts to vindicate their rights to sue under the federal securities laws in the United States. However, in the absence of a publicly disclosed, principled position from the SEC, this Court's policy of according deference to the enforcement agency has no place, because the agency has offered nothing to which any court might defer.

B. The SEC's default in seeking broad enforcement of the anti-waiver provisions is puzzling. It is particularly so in the light of SEC opposition to relaxed disclosure requirements for foreign issuers that seek listings on American stock exchanges, especially since the SEC's ability to regulate these standards may require vigorous enforcement of the anti-waiver provisions (see subsection I(B)). The

---

[20] The Seventh Circuit also relied on its recent decision in *Hugel v. Corporation of Lloyd's*, No. 92-2240, 1993 U.S. App. LEXIS 17106 (7th Cir. July 8, 1993), where the plaintiffs sued only on common law contract and tort claims. The Seventh Circuit's parity of treatment of those common law claims and claims under the 1933 and 1934 Acts deprives the anti-waiver provisions of any meaningful effect.

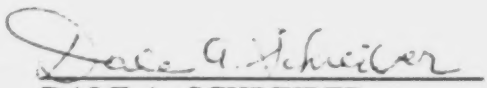
apparent inconsistency in the SEC's approach[21] should be regarded as another compelling factor favoring review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 30, 1993

Respectfully submitted,



DALE A. SCHREIBER
Counsel of Record for Petitioners
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3475

Of Counsel

MINNA SCHRAG
STEVEN B. FEIGENBAUM
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

---

[21] The SEC began a private investigation of Lloyd's in 1991, and abruptly halted the investigation in June 1992, shortly after a visit to the United States by British Prime Minister Major. A recent article appearing in a British publication, *Lloydy Luck*, PRIVATE EYE, July 2, 1993, at 28 (Appendix H), asserts that the SEC investigation was halted by Mr. Major's intervention.

APPENDIX A

APPENDIX A

PETITIONERS

John H. Abeles
Roger Anderson
Charles G. Bentzin
Peter A. Benz
Susan B. Bolin
Amanda A. Bryan
Florence E. Bryan
Suzanne E. Bryan
Anne L. Bryan
John M. Bryan
Robert S. Clarke
Patrick J. Collins
Thorton Cooke
Daniel F. Coughlin
Robert L. Cox
Albert B. Crutcher Jr.
Donald D. Decenso
James S. Deely
Stephen E. Delaszlo
Marco Dilaurenti
John D. Diver
David Dolgenos
Lydia P. Dugan
Albert W. Dugan
Robert E. Eakin
Lee R. Ellenburg, Jr.
Jules I. Epstein
Tillman R. Fesperman
Robert F. Fogelman
Martha H. Fogelman
Robert S. Forman
Leonard Friedman
Karole E. Glaser
Marvin Goodson
Oliver R. Grace, Sr.
Jack D. Gray
Andrew Grossman
Kathryn B. Hampton
Alton B. Harris
A. Cary Harrison III
Michael C. Hartley
Carol M. Hathaway
Linda Tufts Hebbler
Jerome E. Hickey
Roger W. House
Alan J. Hunken
Charles A. Janda
Dale A. Jenkins
Sidney Kahn
Audrey W. Katz
Robert P. Keith
Robert B. King
Alan W. Kral
James E. Krause
Nancy Kurz
Raymond C. Lee
Jeanne Long
Janis L. Macmillan
Charles A. Malkemus
Andrew H. Marks
J. Stephen Marks
Mary L. Marks

James L. McCormick
Paul W. McMullan
Allison Mercer
Norman N. Mintz
Henry A. Mitchell, Jr.
Charles E. Morris
Alvin B. Moss
William B. Murray
Martha Long Navarro
Margaret W. Nichol
Katherine S. Nordhaus
James J. O'Sullivan, Jr.
Charles W. Olson
Rosemary H. Pasek
Joseph N. Pattison
Libby B. Pohoryles
Charles F. Robinson
John H. Robison
Joe R. Roby
John S. Roby
Herbert A. Rubin
Jacob A. Rubin
Robert W. Ruder
Gregory J. Salko
Constantine Salonitis
Arthur Schechner
Charles Schnaid
Louis B. Schoen
Robert G. Sims
K. Dino Sirakides
Frederick E. Smithline
Anthony B. Soskin
Joel M. Spiro
Gilchrist B. Stockton Jr.
William N. Stout
Herman G. Sturman
Kenneth M. Taylor
James D. Tufts, III
James D. Tufts, II
Alyson Warner
Henri L. Wedell
Charles I. Wellborn
Earl D. Whittemore
Marvel Wilson, Jr.
Herbert N. Zack
Shirley R. Zaid
William T. Zanoni
Wilson M. Zildjian

APPENDIX B

APPENDIX B

RESPONDENTS

THE CORPORATION OF LLOYD'S
a/k/a THE SOCIETY AND COUNCIL OF LLOYD'S
d/b/a LLOYD'S OF LONDON

The Governing Body Defendants
(and Their Individual Internal Members):

THE COUNCIL OF LLOYD'S
THE COMMITTEE OF LLOYD'S
Simon Arnold
Michael Cockell
David Coleridge
Peter Daniels
Henry Dobinson
John Greig
Richard Hazell
Anthony Hines
Gordon Hutton
Alan Jackson
Bryan Kellett
Robert Keville
Murray Lawrence
Alan Lord
Stephen Merrett
Peter Miller
Colin Murray
Alan Parry
David Rowland
Michael Wade
Philip Wroughton

The Member's Agents Defendants
(and Their Respective Chairs of the Board):

ALEXANDER HOWDEN & BECK LTD.,
P.M. Graham,
BANKSIDE MEMBERS AGENCY LTD.,
D.E. Biggs,
J.B. Marshall,
BPC MEMBERS AGENCY, LTD.,
D.T. Carey,
C.L. Jackson,
CATER ALLEN MEMBERS AGENCY,
D.J. White,
CHILTREN UNDERWRITING AGENTS LTD.,
N.A. Lewis,
CUTHBERT HEATH MEMBERS AGENCY LTD.,
D. Hazelwood,
J.H. DAVIES UNDERWRITING AGENCY LTD.,
J.H. Davies,
DONNER UNDERWRITING AGENCIES LTD.,
C.E. Parnell,
FENCHURCH UNDERWRITING AGENCIES LTD.,
C.A.G. Keeling,
GARDNER MOUNTAIN & CAPEL CURE AGENCIES LTD.,
J.G. Hogg,
GOODA & PARTNERS, LTD.,
A.W. Gooda,
HARRISON BROTHERS (U/A) LTD.,
D.B.K. Harrison,
JARDINE (LLOYD'S UNDERWRITING AGENTS) LTD.,
D.R. Walker,
JARDINE (LLOYD'S UNDERWRITING AGENTS) 1990 LTD.,
J.G. Curtis,
KILN MEMBERS AGENCY LTD.,
D.L. Dann,
KINGSLEY UNDERWRITING AGENCIES LTD.,
R.C. Kingsley,
R.C. Hallam,

LIME STREET UNDERWRITING AGENCIES LTD.,
R.C. Kingsley,
R.C. Hallam,
LONDON WALL MEMBERS' AGENCY LTD.,
P.M. Graham,
R.H. Warrender,
RAF MACMILLAN & CO.,
M.A. Brecknell,
R.A.F. MacMillan,
MOCATTA DASHWOOD MEMBERS AGENTS LTD.,
F. Dashwood,
MURRAY LAWRENCE MEMBERS' AGENCY,
W.N.M. Lawrence,
NELSON HURST & MARSH (UNDERWRITING AGENCIES), LTD.
B.P. Marsh,
OCTAVIAN UNDERWRITING LTD.,
J.R.T. Church,
F. Dashwood,
PW KININMONTH LTD.,
P.W. Kininmonth,
ROSE THOMSON YOUNG (UNDERWRITING) LTD.,
D.H.H. Meacock,
SCOTT UNDERWRITING AGENCIES LTD.,
G.W. Scott,
RW STURGE LTD.,
C.E. Parnell,
W.S. Strathalmond,
SECRETAN (UNDERWRITING AGENCIES) LTD.,
A.D. Pilcher,
SEDGWICK LLOYD'S UNDERWRITING AGENTS LTD.,
J.M. Gordon,
SCOTT UNDERWRITING AGENCIES LTD.,
G.W. Scott,
SCOTT CAUDLE HILSUM LTD.,
J.D. Scott,
THOS R. MILLER & SON (UNDERWRITING AGENTS) LTD.,
Peter Miller,

VANGUARD UNDERWRITING AGENCIES, LTD.,
T.J. Pepper,
KC WEBB (UNDERWRITING) LTD.,
J.G. Hogg,
WILLIS FABER & DUMAS (AGENCIES) LTD.,
J.N.W. Wooderson,
WELLINGTON MEMBERS' AGENCY LTD.,
J.O. Prentice,

The Managing Agent Defendants
(and Their Respective Chairs of the Board):

ANTON MANAGING AGENCY LTD.,
S.R. Merrett,
ARAGORN AGENCIES LTD.,
A.J.W.F. Wallace,
AJ ARCHER & CO. LTD.,
A.J. Archer,
AUSTIN CAUDLE (U/A) LTD.,
B.F. Caudle,
BANKSIDE SYNDICATES LTD.,
E.E. Patrick,
BARDER & MARSH,
J.H. Barder,
BIRRELL SMITH UNDERWRITING AGENCIES LTD.,
GUEST BARNES (UNDERWRITING AGENCIES) LTD.,
D.J. White,
BPC UNDERWRITING AGENCIES LTD.,
C.L. Jackson,
CASSIDY DAVIS UNDERWRITING LTD.,
D.A. Pease,
CATER ALLEN SYNDICATE MANAGEMENT LTD.,
D.J. White,
BF CAUDLE AGENCIES LTD.,
B.F. Caudle,
CHARMAN UNDERWRITING AGENCIES LTD.,
J.R. Charman,
HG CHESTER & CO. LTD.,
R.J. Martin,
CHRISTOPHERSON HEATH LTD.,
R.E. Heath,
CLAREMOUNT UNDERWRITING AGENCY LTD.,
J.W. Oakes,
D.R. Walker,
COX NEWTON & HARMAN LTD.,
D.E. Harman,

CUTHBERT HEATH UNDERWRITING LTD.,
J.W. Pryke,
CUTLER UNDERWRITING AGENCIES LTD.,
D.E. Dowlen,
JH DAVIES UNDERWRITING AGENCY LTD.,
J.H. Davies,
DEVONSHIRE UNDERWRITING AGENCY LTD.,
P.W.G. Suttle,
EDWARDS & PAYNE (UNDERWRITING AGENCIES) LTD.,
C.H.A. Skey,
NT EVENNETT & PARTNERS LTD.,
N.T. Evennett,
FELTRIM UNDERWRITING AGENCIES, LTD.,
P.F. Fagan,
GOODA WALKER LTD.,
A.W. Gooda,
GRAVETT & TILLING (UNDERWRITING AGENCIES) LTD.,
M.A. Gravett,
GRESHAM UNDERWRITING AGENCIES LTD.,
T.G. Green,
JANSON GREEN LTD. MARINE/AVIATION SYNDICATES DIVISION,
G.R.P.N. Valentine,
J.R.L. Youell,
JANSON GREEN LTD. WETHERELL NON-MARINE DIVISION,
G.R.P.N. Valentine,
J.M.W.P. Wetherell,
THE HEXAD PARTNERSHIP,
The Marquess of Downshire,
HOLMES HAYDAY (UNDERWRITING AGENCIES) LTD.,
T.J. Hayday,
GW HUTTON & CO. (UNDERWRITING AGENCY) LTD.,
G.W. Hutton,
BPD KELLETT & COMPANY LTD.,
B.P.D. Kellett,
RJ KILN & CO. LTD.,
C.K. Murray,

KPH UNDERWRITING AGENCIES LTD.,
D.G. King,
KNIGHTSTONE (MANAGING AGENCY) LTD.,
G. Cooper,
LONDON WALL MANAGING AGENCY LTD.,
R.H. Warrender,
LONDON RIVER UNDERWRITING MANAGEMENT LTD.,
J.M. Poland,
MARK LOVEDAY UNDERWRITING AGENCIES LTD.,
RAF MACMILLAN & CO. LTD.,
M.A. Brecknell,
R.A.F. MacMillan,
MANDER THOMAS & COOPER (UNDERWRITING AGENTS) LTD.,
C.J. Mander,
MERRETT UNDERWRITING AGENCY MANAGEMENT LTD.,
J.R. Robson,
S.R. Merrett,
MFK UNDERWRITING AGENCY LTD.,
M.C. Watkins,
MIS UNDERWRITING AGENCY LTD.,
S.R. Merrett,
MURRAY LAWRENCE & PARTNERS LTD.,
W.N.M. Lawrence,
NEWGREEN UNDERWRITING AGENCIES LTD.,
D.M. Holman,
OCTAVIAN SYNDICATE MANAGEMENT LTD.,
J.R.T. Church,
RHM OUTHWAITE (UNDERWRITING AGENCIES) LTD.,
Lord Havers,
OXFORD SYNDICATE MANAGEMENT LTD.,
D.E. Coleridge,
RM PATEMAN UNDERWRITING AGENCIES LTD.,
R.M. Pateman,
PETER PEPPER (UNDERWRITING AGENCIES) LTD.,
P.L. Pepper,
JOHN POLAND (MANAGING AGENCY) LTD.,
T.M. Bradley,

RD UNDERWRITING AGENCIES LTD.,
J.M. Donner,
ROBERTS & HISCOX LTD.,
R.R.S. Hiscox,
RD ROBERTSON UNDERWRITING AGENCY LTD.,
D.J. White,
C.W. ROME UNDERWRITING AGENCY LTD.,
C.W. Rome,
ROSE THOMPSON YOUNG (UNDERWRITING) LTD.,
D.H.H. Meacock,
LR SAWYER (UNDERWRITING) LTD.,
L.R. Sawyer,
FLP SECRETAN & CO. LTD.,
A.D. Pilcher,
STREET (UNDERWRITING AGENCIES) LTD.,
C.K. Murray,
STEWART & HUGHMAN LTD.,
D.C. Craig,
STURGE MARINE SYNDICATE MANAGEMENT LTD.,
B.E. Beagley,
T.J. Hayday,
THREE QUAYS UNDERWRITING MANAGEMENT LTD.,
D.J. White,
VENTON UNDERWRITING AGENCIES LTD.,
R.N. Alwen,
WELLINGTON UNDERWRITING AGENCIES LTD.,
J.O. Prentice,
WENDOVER UNDERWRITING AGENCY LTD.,
A.D. Shead,
WREN SYNDICATE MANAGEMENT LTD.,
N.C. Haydon,

The Syndicate Defendants:

SYNDICATE 2, 10, 15, 17, 28, 31, 33, 37, 40, 47, 48, 51, 52, 53, 62, 65, 79, 80, 97, 102, 103, 104, 105, 108, 109, 112, 122, 123, 138, 144, 153, 156, 162, 164, 179, 182, 183, 185, 190, 197, 203, 204, 205, 206, 207, 209, 210, 212, 216, 218, 219, 225, 227, 228, 229, 234, 235, 253, 254, 255, 256, 257, 264, 270, 271, 272, 282, 288, 290, 293, 295, 296, 298, 299, 304, 305, 309, 310, 314, 317, 318, 319, 321, 322, 323, 329, 330, 331, 332, 340, 342, 349, 350, 362, 363, 366, 367, 370, 375, 376, 382, 384, 386, 387, 388, 396, 397, 401, 404, 406, 417, 418, 421, 428, 435, 437, 439, 445, 448, 454, 456, 457, 463, 469, 471, 475, 483, 484, 488, 490, 498, 500, 503, 505, 506, 508, 509, 510, 512, 527, 529, 530, 535, 536, 540, 542, 544, 545, 546, 552, 554, 557, 560, 561, 566, 570, 573, 575, 577, 582, 584, 588, 601, 602, 603, 604, 609, 613, 623, 625, 633, 635, 636, 648, 657, 658, 660, 661, 662, 674, 685, 694, 697, 702, 711, 718, 724, 726, 727, 732, 733, 735, 740, 741, 744, 745, 760, 764, 780, 782, 785, 787, 794, 799, 800, 803, 807, 808, 816, 820, 824, 831, 833, 836, 839, 843, 847, 850, 851, 860, 861, 866, 868, 872, 877, 887, 892, 896, 901, 904, 907, 913, 919, 920, 923, 925, 926, 929, 932, 939, 942, 947, 950, 955, 957, 958, 959, 960, 963, 965, 979, 980, 982, 989, 994, 998, 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1011, 1014, 1019, 1021, 1023, 1025, 1027, 1028, 1034, 1035, 1036, 1038, 1041, 1046, 1048, 1049, 1052, 1058, 1066, 1067, 1068, 1069, 1079, 1083, 1084, 1085, 1086, 1087, 1091, 1093, 1095, 1096, 1097, 1098, 1101, 1102, 1104, 1105, 1112, 1114, 1117, 1118, 1122, 1125, 1129, 1137, 1139, 1141, 1143, 1144, 1145, 1148, 1151, 1152, 1153, 1156, 1158, 1162, 1163, 1171, 1173, 1176, 1179, 1181, 1182, 1184 **AT LLOYD'S OF LONDON**

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 870—August Term, 1992

(Argued February 5, 1993 Decided June 2, 1993)

Docket No. 92-9032

JOHN S. ROBY; SUSAN B. BOLIN; AMANDA A. BRYAN; ANNE L. BRYAN; FLORENCE E. BRYAN; JOHN M. BRYAN; SUZANNE E. BRYAN; ROBERT S. CLARKE; PATRICK J. COLLINS; DANIEL F. COUGHLIN; ROBERT L. COX; JOHN D. DIVER; ALBERT W. DUGAN; LEE R. ELLENBURG; JULES I. EPSTEIN; TILLMAN R. FESPERMAN; MARTHA H. FOGELMAN; ROBERT F. FOGELMAN; ROBERT S. FORMAN; LEONARD FRIEDMAN; MARVIN GOODSON; ANDREW GROSSMAN; KATHRYN B. HAMPTON; ALTON B. HARRIS; MICHAEL C. HARTLEY; CAROL M. HATHAWAY; JEROME E. HICKEY; ALAN J. HUNKEN; DALE A. JENKINS; ROBERT B. KING; RICHARD J. KISSEL; RAYMOND C. LEE; JANIS L. MACMILLAM; J. STEVEN MARKS; MARY L. MARKS; JAMES L. MCCORMICK; NORMAN N. MINTZ; CHARLES E. MORRIS; ALVIN B. MOSS; WILLIAM B. MURRAY; MARGARET W. NICHOL; ROSEMARY H. PASEK; JOSEPH N. PATTISON; CHARLES F. ROBINSON; JOHN N. ROBINSON; JOE R. ROBY; HERBERT A. RUBIN; JACOB A. RUBIN; ROBERT W. RUDER; CONSTANTINE SALONITIS; ARTHUR SCHECHNER; CHARLES SCHNAID; LOUIS B. SCHOEN; K. DINO SIRAKIDES; JOEL M. SPIRO; GILCHRIST B. STOCKTON, JR.; WILLIAM N. STOUT; KENNETH M. TAYLOR; MARVEL WILSON, JR.; HENRI L. WEDELL; CHARLES I. WELLBORN; WILLIAM T. ZANONI; ROGER ANDERSON; CHARLES G. BENTZIN; PETER A. BENZ;

THORTON COOKE; DONALD D. DECENSO; MARCO DILAURENTI; LYDIA P. DUGAN; ROBERT E. EAKIN; KAROLE E. GLASER; OLIVER R. GRACE, SR.; JACK D. GRAY; A. CARY HARRISON, III; SIDNEY KAHN; AUDREY W. KATZ; ROBERT P. KEITH; ALAN W. KRAL; JAMES E. KRAUSE; NANCY KURZ; PAUL W. MCMULLAN; HENRY A. MITCHELL, JR.; KATHERINE S. NORDHAUS; CHARLES W. OLSON; JAMES J. O'SULLIVAN, JR.; LIBBY B. POHORYLES; ANTHONY B. SOSKIN; HERMAN G. STURMAN; ALYSON WARNER; EARL D. WHITTEMORE; HERBERT N. ZACK; JOHN H. ABELES; ALBERT B. CRUTCHER, JR.; JAMES S. DEELY; STEPHEN E. DELASZLO; DAVID DOLGENOS; LINDA TUFTS HEBBLER; ROGER W. HOUSE; CHARLES A. JANDA; JEANNE LONG; CHARLES A. MALKEMUS; ANDREW H. MARKS; ALLISON MERCER; MARTHA LONG NAVARRO; GREGORY J. SALKO; ROBERT G. SIMS; FREDERICK E. SMITHLINE; JAMES D. TUFTS, II; JAMES D. TUFTS, III; SHIRLEY R. ZAID; WILSON M. ZILDJIAN,

Plaintiffs-Appellants,

v.

CORPORATION OF LLOYD'S, also known as Society & Council of Lloyd's, doing business as Lloyd's of London; COUNCIL OF LLOYD'S; COMMITTEE OF LLOYD'S; SIMON ARNOLD; MICHAEL COCKELL; DAVID COLERIDGE; PETER DANIELS; HENRY DOBINSON; JOHN GREIG; RICHARD HAZELL; ANTHONY HINES; GORDON HUTTON; ALAN JACKSON; BRYAN KELLETT; MURRAY LAWRENCE; ALAN LORD; STEPHEN MERRETT; PETER MILLER; COLIN MURRAY; ALAN PARRY; DAVID ROWLAND; MICHAEL WADE; BANKSIDE MEMBERS AGENCY LTD.; D.E. BIGGS; BPC MEMBERS AGENCY LTD.; C.L. JACKSON; FENCHURCH UNDERWRITING AGENCIES LTD.; C.A.G. KEELING; GARDNER MOUNTAIN & CAPEL CURE AGENCIES LTD.; J.G. HOGG; GOODA & PARTNERS LTD.; A.W. GOODA; JARDINE LTD.; D.R. WALKER; J.H. DAVIES UNDERWRITING AGENCY LTD.; J.H. DAVIES; LONDON WALL MEMBERS AGENCY LTD.; NELSON HURST & MARSH AGENCIES LTD.; B.P.

MARSH; 0CTAVIAN UNDERWRITING LTD.; J.R.T. CHURCH; PW KININMONTH LTD.; R.W. STURGE LTD.; C.E. PARNELL; SECRETAN UNDERWRITING AGENCIES LTD.; A.D. PILCHER; SEDGEWICK LLOYD'S UNDERWRITING AGENCIES LTD.; J.M. GORDON; THOS R. MILLER & SON UNDERWRITING AGENTS LTD.; PETER MILLER; WILLIS, FABER & DUMAN, AGENCIES LTD.; J.N.W. WOODERSON; ANTON MANAGING AGENCY LTD.; S.R. MERRETT; AJ ARCHER & CO. LTD.; A.J. ARCHER; BANKSIDE SYNDICATES LTD.; E.E. PATRICK; BARDER & MARSH; J.H. BARDER; BCP UNDERWRITING AGENCIES LTD.; C.L. JACKSON; CATER ALLEN UNDERWRITING AGENCY LTD.; B.F. CAUDLE AGENCIES LTD.; B.F. CAUDLE; CHARNAM UNDERWRITING AGENCIES LTD.; J.R. CHARNAM; H.G. CHESTER & CO. LTD.; R.J. MARTIN; CHRISTOPHERSON HEATH LTD.; R.E. HEATH; CLAREMOUNT UNDERWRITING AGENCY LTD.; J.W. OAKES; COX, NEWMAN & HARMAN LTD.; D.E. HARMAN; CUTHBERT, HEATH UNDERWRITING LTD.; J.W. PRYKE; JH DAVIES UNDERWRITING AGENCY LTD.; J.H. DAVIES; DEVONSHIRE UNDERWRITING AGENCY LTD.; P.W.G. SUTTLE; NT EVENNETT & PARTNERS LTD.; N.T. EVENNETT; FELTRIM UA LTD.; P.F. FAGAN; GOODA WALKER LTD.; A.W. GOODA; GRESHAM UA LTD.; T.G. GREEN; JOHNSON GREENE LTD., MARINE/AVIATION SYNDICATES DIV.; G.R.P.N. VALENTINE; J.R.L. YOUELL; HEXAD PARTNERSHIP; MARQUEES OF DOWNSHIRE; G.W. HUTTON & CO. LTD.; G.W. HUTTON; BPD KELLETT & CO. LTD.; BPD KELLETT; LONDON WALL MANAGING AGENCIES; R.H. WARRENDER; LONDON RIVER UNDERWRITING MANAGEMENT LTD.; J.M. POLAND; MERRETT SYNDICATES LTD.; J.R. ROBSON; MURRAY LAWRENCE & PARTNERS LTD.; W.N.M. LAWRENCE; D.M. HOLMAN; OCTAVIAN SYNDICATE MANAGEMENT LTD.; D.E. COLERIDGE; R.M. PATEMAN; R.M. PATEMAN UNDERWRITING AGENCIES LTD.; PETER PEPPER LTD.; P.L. PEPPER; JOHN POLAND LTD.; T.M. BRADLEY; RD UNDERWRITING AGENCIES LTD.; J.M. DONNER; C.W. ROME UNDERWRITING AGENCIES LTD.; C.W. ROME; ROSE, THOMPSON, YOUNG LTD.; L.R. SAWYER LTD.; FLP

SECRETAN & CO. LTD.; A.D. PILCHER; STREET LTD.; C.K. MURRAY; STURGE MARINE SYNDICATE MANAGEMENT LTD.; B.E. BEAGLEY; WELLINGTON UNDERWRITING AGENCIES LTD.; J.O. PRENTICE; WENDOVER UNDERWRITING AGENCY LTD.; A.D. SHEAD; ALEXANDER HOWDEN & BECK LTD.; P.M. GRAHAM; D.T. CAREY; CATER ALLEN MEMBERS AGENCY; D.J. WHITE; CHILTREN UNDERWRITING AGENCIES LTD.; N.A. LEWIS; HARRISON BROTHERS (U/A) LTD.; D.B.K. HARRISON; JARDINE (LLOYD'S UNDERWRITING AGENTS) 1990 LTD.; KINGSLEY UNDERWRITING AGENCIES LTD.; R.C. KINGSLEY; R.C. HALLAM; LIME STREET UNDERWRITING AGENCIES LTD.; RAF MACMILLAN & CO.; M.A. BRECKNELL; RAF MACMILLAN; MOCATTA DASHWOOD MEMBERS AGENTS LTD.; F. DASHWOOD; MURRAY LAWRENCE MEMBERS AGENCY; W.N.M. LAWRENCE; P.W. KININMONTH; ROSE THOMSON YOUNG (UNDERWRITING) LTD.; D.H.H. MEACOCK; SCOTT UNDERWRITING AGENCIES LTD.; G.W. SCOTT; VANGUARD UNDERWRITING AGENCIES, LTD.; T.J. PEPPER; KC WEBB (UNDERWRITING) LTD.; J.G. HOGG; ARAGORN AGENCIES LTD.; A.J.W.F. WALLACE; AUSTIN CAUDLE (U/A) LTD.; B.F. CAUDLE; GUEST BARNES (UNDERWRITING AGENCIES) LTD.; BIRRELL SMITH UNDERWRITING AGENCIES LTD.; CATER ALLEN SYNDICATE MANAGEMENT LTD.; EDWARD & PAYNE (UNDERWRITING AGENCIES) LTD.; C.H.A. SKEY; JANSON GREEN LTD.; WETHERELL NON-MARINE DIVISION; G.R.P.N. VALENTINE; J.M.W.P. WETHERELL; B.P.D. KELLETT; RJ KILN & CO. LTD.; KPH UNDERWRITING AGENCIES LTD.; D.G. KING; MARK LOVEDAY UNDERWRITING AGENCIES LTD.; MERRETT UNDERWRITING AGENCY MANAGEMENT LTD.; NEWGREEN UNDERWRITING AGENCIES LTD.; J.R.T. CHURCH; OXFORD SYNDICATE MANAGEMENT LTD.; ROBERTS & HISCOX LTD.; R.R.S. HISCOX; RD ROBERTSON UNDERWRITING AGENCY LTD.; L.R. SAWYER; THREE QUAYS UNDERWRITING MANAGEMENT LTD.; ROBERT KEVILLE; PHILIP WROUGHTON; J.B. MARSHALL; CUTHBERT HEATH MEMBERS AGENCY LTD.; D. HAZELWOOD; DONNER UNDERWRITING AGENCIES LTD.;

J.G. CURTIS; KILN MEMBERS AGENCY LTD.; D.L. DANN; W.S. STRATHALMOND; SCOTT CAUDLE HILSUM LTD.; J.D. SCOTT; CASSIDY DAVIS UNDERWRITING LTD.; D.A. PEASE; CUTLER UNDERWRITING AGENCIES LTD.; D.E. DOWLEN; GRAVETT & TILLING (UNDERWRITING AGENCIES) LTD.; M.A. GRAVETT; HOLMES HAYDAY (UNDERWRITING AGENCIES) LTD.; T.J. HAYDAY; KNIGHTSTONE (MANAGING AGENCY) LTD.; G. COOPER; MANDER THOMAS & COOPER (UNDERWRITING AGENTS) LTD.; C.J. MANDER; MFK UNDERWRITING AGENCY LTD.; M.C. WATKINS; MIS UNDERWRITING AGENCY LTD.; RHM OUTHWAITE (UNDERWRITING AGENCIES) LTD.; LORD HAVERS; STEWART & HUGHMAN LTD.; D.C. CRAIG; VENTON UNDERWRITING AGENCIES LTD.; R.N. ALWEN; WREN SYNDICATE MANAGEMENT LTD.; N.C. HAYDON; SYNDICATES-2, 10, 15, 17, 28, 31, 33, 37, 40, 47, 48, 51, 52, 53, 62, 65, 79, 80, 97, 102, 103, 104, 105, 108, 109, 112, 122, 123, 138, 144, 153, 156, 162, 164, 179, 182, 183, 185, 190, 197, 203, 204, 205, 206, 207, 209, 210, 212, 216, 218, 219, 225, 227, 228, 229, 234, 235, 253, 254, 255, 256, 257, 264, 270, 271, 272, 282, 288, 290, 293, 295, 296, 298, 299, 304, 305, 309, 310, 314, 317, 318, 319, 321, 322, 323, 329, 330, 331, 332, 340, 342, 349, 350, 362, 363, 366, 370, 375, 376, 397, 382, 384, 386, 387, 388, 396, 397, 401, 404, 406, 417, 418, 421, 428, 435, 437, 439, 445, 448, 454, 456, 457, 463, 469, 471, 483, 484, 488, 490, 498, 500, 503, 505, 506, 508, 509, 510, 512, 527, 529, 530, 535, 536, 540, 542, 544, 545, 546, 552, 554, 557, 560, 561, 566, 570, 573, 575, 577, 582, 584, 588, 601, 602, 603, 604, 609, 613, 623, 625, 633, 635, 636, 648, 657, 658, 660, 661, 662, 674, 685, 694, 697, 702, 711, 718, 724, 726, 727, 732, 733, 735, 740, 741, 744, 745, 760, 764, 780, 782, 785, 787, 794, 799, 800, 803, 807, 808, 816, 820, 824, 831, 833, 836, 839, 843, 847, 850, 851, 860, 861, 866, 868, 872, 877, 887, 892, 896, 901, 904, 907, 913, 919, 920, 923, 925, 926, 929, 932, 939, 942, 947, 950, 955, 957, 958, 959, 960, 963, 965, 979, 980, 982, 989, 994, 998, 1001, 1002, 1003, 1005, 1006, 1007, 1009, 1011, 1014, 1019, 1021, 1023, 1025, 1027, 1028, 1034, 1035, 1036, 1038, 1041, 1046, 1048, 1049, 1052, 1058, 1066, 1067, 1068, 1069, 1079, 1083, 1084, 1085, 1086, 1087, 1091, 1093, 1095, 1096, 1097, 1098, 1101, 1102, 1104, 1105, 1112, 1114, 1117, 1118, 1122,

1125, 1129, 1137, 1139, 1141, 1143, 1144, 1145, 1148, 1151, 1152, 1153, 1156, 1158, 1162, 1163, 1171, 1173, 1176, 1179, 1181, 1182, 1184, AT LLOYD'S OF LONDON,

Defendants-Appellees.

SUBSEQUENT HISTORY: [*1] As Amended July 7, 1993.

PRIOR HISTORY: Appeal from an order dated June 12, 1992 entered in the United States District Court for the Southern District of New York, Lasker, *J.*, that dismissed appellants' complaint against the so-called syndicate defendants on the ground that they lacked legal existence and from a judgment of that court dated August 25, 1992 that dismissed the complaint against the other defendants for improper venue.

DISPOSITION: We affirm.

COUNSEL: DALE A. SCHREIBER, New York City (Minna Schrag, Steven B. Feigenbaum, Adrienne B. Koch, Proskauer Rose Goetz & Mendelsohn, New York City, of counsel), *for Appellants.*

TAYLOR R. BRIGGS, New York City (Sheila H. Marshall, LeBoeuf, Lamb, Leiby & MacRae, New York City, of counsel), *for Appellees The Society, Corporation, Committee and Council of Lloyd's and their individual Internal Members.* JONATHAN C. THAU, New York City (Thomas W. Wilson, Nicholas J. Conca, Fred N. Knopf, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, of counsel), *for Appellees The Members' Agents.* WILLIAM A. MEEHAN, New York City (Daniel M. Bianca, Leo W. Fraser, III, Jeff Imeri, Karen Wallace, Mendes & Mount, New York City, of counsel), *for Appellees The "Managing Agent Defendants".* CHARLES A. GILMAN, [*2] New York City (Robert A. Alessi, Marcy A. Siskind, Cahill Gordon & Reindel, New York City, of counsel), *for Appellees The So-Called "Syndicate Defendants".*

JUDGES: Before: MESKILL, *Chief Judge* FEINBERG and WINTER, *Circuit Judges*.

OPINION BY: MESKILL

OPINION:
MESKILL, *Chief Judge*:

Appellants, all American citizens or residents, are more than one hundred "Names" in the Corporation of Lloyd's (Lloyd's). Loosely speaking, Names are investors in Lloyd's syndicates, the entities that nominally underwrite insurance risk. For convenience we will refer to the syndicates as entities; although this is a disputed issue on appeal, we affirm on a different basis and therefore need not resolve this issue. Appellant Names (Roby Names) alleged in their consolidated complaint that they have suffered severe financial loss as a result of appellees' violations of the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (the Securities Act), the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78*ll* (the Securities Exchange Act), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 *et seq.* (RICO). [*3] This opinion, however, addresses only the Roby Names' contention on appeal that their disputes with Lloyd's and Lloyd's entities should be litigated in the United States despite a host of contract clauses that appear to bind them to arbitrate in England under English law. The district court held that those contract clauses must be enforced and therefore dismissed the Roby Names' complaint for improper venue. The Roby Names contend that the district court erred because (1) the clauses by their very terms do not protect certain defendants and do not cover the substance of appellants' complaints, and (2) the clauses are unenforceable because they effectively waive compliance with the United States securities laws, contrary to the antiwaiver provisions of those laws and the public policy reflected by them. To understand why we disagree with the Roby Names' arguments it is necessary to understand the structure and operations of Lloyd's, which we discuss in some detail.

BACKGROUND

Lloyd's is not a company; it is a market somewhat analogous to the New York Stock Exchange. Lloyd's' governing bodies, the Council and Committee of Lloyd's, promulgate regulations and enforce compliance therewith. [*4] There are over 300 syndicates competing within Lloyd's for underwriting business, each managed by an entity called a Managing Agent. Each Managing Agent is responsible for its own syndicate's financial well-being; it tries to attract capital and underwriting business. Managing Agents owe a contractual duty to Names to manage their syndicates with reasonable care and skill. Capital comes from Names, who are represented in their dealings with Lloyd's by Members' Agents (also entities). Members' Agents are obliged to act in the sole interest of their principal Names. By agreement, the Members' Agents stand in a fiduciary relationship to their Names. Lloyd's brokers broker underwriting risk to the syndicates by negotiating with the syndicates' Active Underwriters, individuals appointed by the syndicates' Managing Agents. Brokers, Managing Agents, and Members' Agents all compete with their peers in their respective areas.

While eighty percent of Lloyd's 26,000 Names are English, about 2,500, representing more than $ 1 billion in capital, are American. The Roby Names were solicited in the United States by various Lloyd's entities and representatives. Except for a brief meeting in London--a [*5] mandatory formality--the entire process by which the Roby Names became Names took place in the United States. In order to become a Name, an individual had to pass a "means test." The Roby Names assert that in 1988, by which time they had all become Names, this test required prospective Names to maintain a net worth of approximately $ 170,000. By contrast, Lloyd's claims that Names were required to demonstrate that they were "accredited investors" under Regulation D, 17 C.F.R. § 230.501(a) (1992), so that any sale of securities to them would be exempt from the registration requirements of the Securities Act. *See* 15 U.S.C. § 77d(2); 17 C.F.R. § 230.506(b) (1992). While there is evidence that this requirement was established after 1988, Lloyd's has not pointed to any proof that the requirement was in effect prior to 1988. Nevertheless, the Securities and Exchange

Commission (SEC) has never insisted that Lloyd's or Lloyd's entities register securities.

Upon becoming a Name, an individual selects from a list of syndicates--with the aid of only very limited financial information--and decides how much he wishes to invest in each one. In making these [*6] decisions, Names rely to a great extent on the advice of their Members' Agents. The profits that Names earn are in proportion to their capital contributions, and Names bear unlimited liability for their proportionate losses in each syndicate they join. Their liability is several, not joint; no Name is ever responsible for the losses of those fellow Names who comprise the syndicate.

Names are required to enter directly into two agreements and indirectly into two others.[1] The "General Undertaking" is between a Name and the Lloyd's' governing bodies and contains choice of forum (England) and choice of law (English) clauses. This undertaking does not contain an arbitration clause. The "Members' Agent's Agreement" is between a Name and his Members' Agent and also contains choice of forum (England), arbitration and choice of law (English) clauses. The Members' Agent's Agreements specifically authorize the Members' Agents to enter into a third agreement on behalf of the Names, called the "Managing Agent's Agreement." This agreement, not signed by the Names themselves, and apparently often not even signed by the Managing Agents, defines the rights and obligations of the Managing Agent of [*7] a syndicate and that syndicate's Names, and also contains choice of forum (England), arbitration and choice of law (English) clauses. In turn, the Managing Agent's Agreement authorizes the Managing Agents to enter, on behalf of themselves, the Names and the Members' Agents, into a "Syndicate and Arbitration Agreement" which requires disputes

---

[1] A slightly different structure existed prior to 1990, but the differences are irrelevant for purposes of this appeal and affect at most only five of the 109 appellants.

related to the affairs of the particular syndicate to be arbitrated in London.

In their consolidated complaint, the Roby Names allege violations of sections 12(1) and 12(2) of the Securities Act, 15 U.S.C. § 771(1), (2), and section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b). In addition, they allege "controlling person" liability under section 15 of the Securities Act, 15 U.S.C. § 77o, [*8] and section 20 of the Securities Exchange Act, 15 U.S.C. § 78t. Finally, using these securities law violations as predicate acts, the Roby Names allege several violations of RICO. Each cause of action names as defendants a different combination of the following parties: Lloyd's, Lloyd's' governing bodies, certain Managing and Members' Agents, certain individual members of these entities (the Chairs), and certain syndicates.

By order dated June 12, 1992, Judge Lasker dismissed the complaint against the "syndicate defendants," finding that they had no separate existence and therefore could not be sued as entities. By subsequent order dated August 18, 1992, the judge found that the interlocking set of agreements bound the Roby Names to arbitrate or litigate their disputes in London and dismissed the complaint in its entirety for improper venue. A judgment dated August 25, 1992 was entered to this effect. The Roby Names appeal from the June 12th order and the August 25th judgment.

DISCUSSION

The Roby Names maintain that their investments in Lloyd's syndicates constitute "securities" under the securities laws. We decline to rule on this question today, [*9] noting only that we have received little guidance from the SEC on this issue. Instead, we will assume for purposes of this appeal that the Roby Names' consolidated complaint states cognizable claims under the securities laws. For the sake of precision, we note that the assumed sale of a security occurs not when an individual *becomes* a Name, but instead when a Name *pledges capital* to a syndicate. Nevertheless, we understand the Roby Names to argue that the *solicitation* of

individuals to become Names is in fact part of the overall process of soliciting them to pledge capital (i.e., to buy "securities").

The Roby Names present us with two basic arguments as to why these suits should be litigated in the United States: (1) the contract clauses, by their terms, apply neither to the substance of their claims nor to certain defendants; and (2) the clauses are unenforceable due to the public policy codified in the securities laws. We find neither of these arguments persuasive.

I. *Scope of the Contract Clauses*

A. *Parties Covered*

We believe every defendant in this action, in the words of Judge Lasker, is either "protected directly by the [contract] clauses or [is [*10] an] intended beneficiar[y] entitled to enforce them." *Roby v. The Corporation of Lloyd's*, No. 91 Civ. 7081, 1992 U.S. Dist. LEXIS 12367, at *14 (S.D.N.Y. Sept. 3, 1992, as amended). We reject, therefore, the Roby Names' arguments that neither the syndicates, the Managing Agents nor the individual Chairs of the Managing and Members' Agents may assert the protection of these clauses.

1. *Syndicates*

Judge Lasker dismissed the Roby Names' action against the syndicates on the ground that they had no entity existence. Although the Roby Names dispute this legal determination, we need not decide the issue because we may of course affirm the judgment of the district court on any basis that has support in the record. *See I. Meyer Pincus & Assocs. v. Oppenheimer & Co.*, 936 F.2d 759, 761 (2d Cir. 1991). Consequently, even if we assume the syndicates do have entity existence, we would affirm their dismissal on the basis of improper venue.

Paragraph 2.2 of the General Undertaking states, in pertinent part:

Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute [*11] and/or controversy of whatsoever nature arising out of or relating to the [Name's] membership of, and/or underwriting of insurance business at, Lloyd's.

Paragraph 2.1 is equally broad and provides for the application of English law. The syndicates are third-party beneficiaries of this agreement. As Professor Corbin has said, a third party will have an enforceable right "if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as one of the motivating causes of his making the contract." 4 Arthur L. Corbin, *Corbin on Contracts* @ 776, at 18 (3d ed. 1967). Here, the syndicates have a pecuniary interest in the certainty and consistency of litigating in one nation's courts under one nation's laws. The extremely broad language of the General Undertaking should make it clear that Lloyd's' intent was to benefit all Lloyd's entities, particularly because potential actions against Lloyd's itself are limited in nature and the broad language of paragraphs 2.1 and 2.2 otherwise would be sorely *over*broad. Moreover, paragraph 1, which is the only other substantive [*12] provision in the General Undertaking, requires Names to abide by the provisions of any other contract authorized by the Council (including, *e.g.*, the Members' Agent's Agreement). We believe this indicates that the General Undertaking was meant to govern the Names' general obligations within the entire Lloyd's community.

As a fallback position, the Roby Names rightly observe that Judge Lasker refused to issue an order confirming that his decision dismissing the action against the other defendants for improper venue applied equally to the syndicate defendants. However, the judge offered no explanation for his refusal and we believe he was simply exercising cautious restraint rather than definitively ruling that the improper venue decision did not apply to the syndicates. Because we believe the reasoning of the venue decision is equally applicable to the syndicate defendants, we hold that the syndicates,

if they are entities, are also entitled to the benefits of the forum selection and choice of law clauses.

The General Undertaking contains no arbitration clause, and therefore we do not decide today whether the Roby Names are bound to arbitrate with the syndicates. Whether the [*13] Syndicate and Arbitration Agreement or some other agreement may be interpreted to require the Roby Names to arbitrate is a question that should be decided under English law in an English court pursuant to the General Undertaking.

2. *Managing Agents*

The Roby Names contend that they are not bound by the Managing Agent's Agreements because neither they nor the Managing Agents ever signed them. However, the parties clearly assented to be bound by the Managing Agent's Agreements. First, the Roby Names signed the Members' Agent's Agreements which authorize their Members' Agents to enter into Managing Agent's Agreements on their behalf. Second, they signed the General Undertaking which requires them to abide by all of Lloyd's bylaws. Bylaw 8 prohibits any Name from underwriting insurance at Lloyd's other than pursuant to the standard agreements. By underwriting insurance, the Roby Names have demonstrated their intent to be bound by the Managing Agent's Agreements. Similarly, the Managing Agents, by acting in their capacity in accordance with the web of standard agreements, clearly have demonstrated their intent to abide by the provisions of the Managing Agent's Agreements.

3. *Individual [*14] Chairs*

The Roby Names next contend that the individual Chairs of the Members' and Managing Agents are neither signatories to nor third-party beneficiaries of any agreement with the Roby Names and therefore that they must litigate in federal court. We agree with the district court, however, that the individual Chairs are entitled to rely on the contract clauses incorporated into their employers' agreements.

Courts in this and other circuits consistently have held that employees or disclosed agents of an entity that is a party to an arbitration agreement are protected by that agreement. *See, e.g., Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 216-17 (S.D.N.Y. 1989); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 451 (S.D.N.Y. 1985); *Nesslage v. York Securities, Inc.*, 823 F.2d 231, 233-34 (8th Cir. 1987). The Roby Names argue that, unlike those cases, the complaints against the individual Chairs are distinct from those against their employers. They contend that the Chairs have not been sued for acts carried out on behalf of the Members' and Managing Agents (Agents) or in violation of the [*15] Agents' contractual obligations to the Roby Names. Instead, they have been sued as "controlling persons" under the securities laws.

We believe that this is a distinction without a legal difference. The complaints against the individual Chairs are completely dependent on the complaints against the Agents. Whether the individual Chairs are disclosed agents or controlling persons, their liability arises out of the same misconduct charged against the Agents. If the scope of the Agents' agreements includes the Agents' misconduct, it necessarily includes the Chairs' derivative misconduct. Moreover, we believe that the parties fully intended to protect the individual Chairs to the extent they are charged with misconduct within the scope of the agreements. If it were otherwise, it would be too easy to circumvent the agreements by naming individuals as defendants instead of the entity Agents themselves.

B. *Disputes Covered*

"[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). The Roby Names contend essentially that [*16] the forum selection and arbitration clauses apply only to disputes arising from the conduct of the defendants as managers, representatives or regulators. Because this conduct can occur only *after* the "securities" have

been sold, the Roby Names claim that they did not agree to arbitration of, or English jurisdiction over, complaints pertaining to the sale of those "securities." They present two basic arguments: (1) because the choice of law clauses require the application of English law, the Roby Names' United States statutory claims cannot possibly be covered under the agreements, and (2) resolution of their claims does not require the construction of the agreements because the Roby Names have not alleged any breach of contract, and the language of the arbitration and forum selection clauses is not broad enough to cover their claims. We reject both arguments.

1. *Application of English Law*

It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of *his country's* tort law or *his country's* statutory [*17] law or *his country's* property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. *See Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir.), *cert. denied*, 464 U.S. 938, 104 S. Ct. 349, 78 L. Ed. 2d 315 (1983). In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.

2. *Scope of the Agreements*

Of course, the Roby Names are quite right that if the substance of their claims, stripped of their labels, does not fall within the scope of the clauses, the clauses cannot apply. However, they must make this argument in the face of strong public policy in favor of forum selection and arbitration clauses. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985);

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 32 L. Ed. 2d 513, 92 S. Ct. 1907 (1972). [*18] Indeed, an order to arbitrate "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960).

There is ample precedent that the scope of clauses similar to those at issue here is not restricted to pure breaches of the contracts containing the clauses. The Managing and Members' Agent's Agreements speak, with respect to the arbitration clauses, in terms of "dispute[s], difference[s], question[s] or claim[s] *relating to*" the agreements and, with respect to the forum selection clauses, in terms of submission for "all purposes of and *in connection with*" the agreements (emphasis added). In *Bense v. Interstate Battery System of America*, 683 F.2d 718, 720 (2d Cir. 1982), we held that a forum selection clause that applied to "causes of action arising directly or indirectly from [the agreement]" covered federal antitrust actions. Similarly, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449, *reh'g [*19] denied*, 419 U.S. 885, 95 S. Ct. 157, 42 L. Ed. 2d 129 (1974), held that controversies and claims "arising out of" a contract for the sale of a business covered securities violations related to that sale. *Id.* at 519-20. We find no substantive difference in the present context between the phrases "relating to," "in connection with" or "arising from." We therefore reject the Roby Names' contention that only allegations of contractual violations fall within the scope of the clauses.

In the instant case the conduct surrounding the underwriting activities at Lloyd's is integrally related to the sale of Lloyd's "securities" because the "security" is essentially equivalent to the underwriting of risk or the pledging of capital. In order to underwrite risk, a Name is required by Lloyd's' bylaws to enter into the Managing and Members' Agent's Agreements. He may not underwrite risk otherwise; that is, he may not "buy the security" otherwise. Misconduct with respect to the sale of these "securities" necessarily "relates to" these required agreements.

It is perhaps even more persuasive that the agreements are in fact not limited to the conduct of business but also [*20] cover the raising of capital. Thus, for instance, the agreements contain certain disclosure requirements. In addition, they establish certain duties of the Agents with respect to the Name and because the agreements are entered into *prior* to the underwriting of risk, these duties are owed with respect to the raising of capital. We believe the agreements are clearly intended to, and in fact do, govern the relationships between Agents and Names with respect to the purchase and sale of Lloyd's "securities." Because the gist of the Roby Names' allegations relates to the sale of those "securities," we hold that their claims "relate to" the Agent's Agreements.

Similarly, and even more forcefully, the broad language of the forum selection clause of the General Undertaking covers the Roby Names' claims at least against Lloyd's' governing bodies. Those claims are undoubtedly related to the Roby Names' "membership of, and/or underwriting of insurance business at, Lloyd's."

II. *Application of the Securities Laws*

The Roby Names argue that the public policy codified in the antiwaiver provisions of the securities laws renders unenforceable any agreement that effectively eliminates compliance [*21] with those laws. The Securities Act provides that "[a]ny . . . stipulation . . . binding any person acquiring any security to waive compliance with any provision of this subchapter . . . shall be void." 15 U.S.C. § 77n. Similarly, the Securities Exchange Act states, "any . . . stipulation . . . binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void." 15 U.S.C. § 78cc(a). According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law. From this, the Roby Names conclude that the contract clauses work to waive compliance with the securities laws and therefore are void.

We note at the outset that *Wilko v. Swan*, 346 U.S. 427, 98 L. Ed. 168, 74 S. Ct. 182 (1953), has been squarely overruled. *See Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989); *see also Shearson/American Express v. McMahon*, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332, [*22] *reh'g denied*, 483 U.S. 1056, 97 L. Ed. 2d 819, 108 S. Ct. 31 (1987) (asserting that the assumptions underlying *Wilko* are no longer valid). *Wilko* held that an agreement to arbitrate future controversies was void under the antiwaiver provision of the Securities Act. We do not doubt that judicial hostility to arbitration has receded dramatically since 1953 and that the arbitral forum is perfectly competent to protect litigants' substantive rights. In the words of the *Mitsubishi* Court, quoted by both the *Rodriguez* and *McMahon* Courts, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." 473 U.S. at 628. If the Roby Names objected merely to the choice of an arbitral rather than a judicial forum, we would reject their claim immediately, citing *Rodriguez* and *McMahon*. However, the Roby Names argue that they have been forced to forgo the *substantive* protections afforded by the securities laws, not simply the judicial forum. We therefore do not believe that *Rodriguez* and *McMahon* are controlling [*23] and must look elsewhere to determine whether parties may contract away their substantive rights under the securities laws.

The Tenth Circuit recently addressed this exact issue in a similar context in *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 121 L. Ed. 2d 584, 113 S. Ct. 658 (1992). Relying primarily on four Supreme Court precedents, *Carnival Cruise Lines v. Shute*, 113 L. Ed. 2d 622, 111 S. Ct. 1522 (1991); *Mitsubishi*, 473 U.S. at 614; *Scherk*, 417 U.S. at 506; *The Bremen*, 407 U.S. at 1, the *Riley Court* concluded that "[w]hen an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect." 969 F.2d at 957; *see also Bonny v. Society of Lloyd's*, 784 F. Supp. 1350,

1353 (N.D. Ill. 1992) (drawing the same conclusion). While we agree with the ultimate result in *Riley*, we are [*24] reluctant to interpret the Supreme Court's precedent quite so broadly.

A. *Presumption of Validity*

The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. *See, e.g., The Bremen*, 407 U.S. at 15.[2] In *The Bremen*, the Court explained that American parochialism would hinder the expansion of American business and trade, and more generally, interfere with the smooth functioning and growth of global commerce. *Id.* at 9. Forum selection and choice of law clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws. Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals. *See Mitsubishi*, 473 U.S. at 629. In addition to these rationales for the presumptive validity of forum selection and choice of law clauses, the Court has noted that contracts entered into freely generally should [*25] be enforced

---

[2] The analysis is no different for the arbitration clauses. Indeed, an arbitration clause is merely a specialized type of forum selection clause. *See Scherk*, 417 U.S. at 519. We might have referred to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 (United States entered on December 29, 1970), *reprinted in* 9 U.S.C. §§ 201-08 (the Treaty), for further support with respect to the arbitration clauses; however, because we are not entirely persuaded that the Treaty applies in the securities context, we prefer to rest our decision on different grounds. Because we understand the Roby Names to complain primarily that the United States securities laws will not be applied and not that the arbitration forum is particularly inappropriate in their case, we do not believe a detailed analysis of the Treaty is necessary.

because the financial effect of forum selection and choice of law clauses likely will be reflected in the value of the contract as a whole. *Carnival Cruise Lines*, 111 S. Ct. at 1527.

This presumption of validity may be overcome, however, by a clear showing that the clauses are "'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10. The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching, 111 S. Ct. at 1528; 407 U.S. at 12-13; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum, 407 U.S. at 18; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy, 111 S. Ct. at 1528; or (4) if the clauses contravene a strong public policy of the forum state, 407 U.S. at 15.

In this case, we can easily dispose of the first two factors. The Roby Names do not contend that they were fraudulently induced into agreeing to the forum selection, choice of law or arbitration clauses. Nor do we believe it gravely inconvenient [*27] for the Roby Names to litigate in London; they found it convenient enough to travel there for their mandatory interviews, and, in any event, many of them presently are prosecuting actions there. Moreover, nothing in the record suggests that the English courts would be biased or otherwise unfair, and United States courts consistently have found them to be neutral and just forums. *See, e.g., Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 829 (5th Cir. 1986). Finally, the Roby Names have not presented any convincing evidence that the chosen arbitral forum would be biased in any way.

As to the third factor, we note that it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States. *See, e.g., Mitsubishi*, 473 U.S. at 629; *Medoil v. Citicorp*, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990). Instead, the question is whether the application of the foreign law presents a danger that the Roby Names "will be deprived of any

remedy or treated unfairly." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981), [*28] *reh'g denied*, 455 U.S. 928, 71 L. Ed. 2d 474, 102 S. Ct. 1296 (1982) (emphasis added) (in *forum non conveniens* context). As we explain below in section C, we believe the Roby Names have ample remedies under English law.

B. *Public Policy*

We depart somewhat from the *Riley* Court with respect to the fourth factor. We believe that there is a serious question whether United States public policy has been subverted by the Lloyd's clauses. In this section we explain our concerns; in section C below we resolve those concerns. Ultimately, we hold that the presumption of validity has not been overcome.

The Supreme Court in *The Bremen* wrote, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15. By including antiwaiver provisions in the securities laws, Congress made clear its intention that the public policies incorporated into those laws should not be thwarted.

The framers of the securities laws were concerned principally with reversing the common law rule favoring "caveat emptor." *See, e.g., SEC v. Arthur Young & Co.*, 190 U.S. App. D.C. 37, 584 F.2d 1018, 1025 n.51 (D.C. Cir. 1978), [*29] *cert. denied*, 439 U.S. 1071, 59 L. Ed. 2d 37, 99 S. Ct. 841 (1979). To this end, the securities laws are aimed at prospectively protecting American investors from injury by demanding "full and fair disclosure" from issuers. *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-28, 44 L. Ed. 2d 539, 95 S. Ct. 1917, *reh'g denied*, 423 U.S. 884, 46 L. Ed. 2d 114, 96 S. Ct. 157 (1975). Private actions exist under the securities laws not because Congress had an overwhelming desire to shift losses after the fact, but rather because private actions provide a potent means of deterring the exploitation of American investors. *See, e.g., Randall v. Loftsgaarden*, 478 U.S. 647, 664, 92 L. Ed. 2d 525, 106 S. Ct. 3143 (1986); *Abrahamson v. Fleschner*, 568 F.2d 862,

872 (2d Cir. 1977), *cert. denied*, 436 U.S. 913, 56 L. Ed. 2d 414, 98 S. Ct. 2253 (1978). We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors.

In this sense, the securities laws somewhat resemble the antitrust laws at issue in *Mitsubishi*. The *Mitsubishi* Court enforced [*30] a clause providing that all disputes arising under a contract between a Puerto Rican corporation and a Japanese corporation be submitted for arbitration by the Japan Commercial Arbitration Association. The Court recognized that private actions under the Sherman Act, 15 U.S.C. § 1 *et seq.*, play a "central role" in promoting the national interest in a competitive economy, 473 U.S. at 634-35. Like private actions in the securities context, private actions under the Sherman Act serve primarily a deterrent purpose. *Id.* at 635. Nevertheless, the *Mitsubishi* Court held that a Japanese arbitration panel, *applying United States antitrust law*, adequately would further the deterrent purpose of the Sherman Act, despite the panel's lack of allegiance to United States' interests. *Id.* at 636-37. The Court indicated quite clearly in dicta, however, that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning [*31] the agreement as against public policy." *Id.* at 637 n.19.[3]

---

[3] *Scherck*, decided eleven years before *Mitsubishi*, is not to the contrary. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 41 L. Ed. 2d 270, 94 S. Ct. 2449, *reh'g denied*, 419 U.S. 885, 42 L. Ed. 2d 129, 95 S. Ct. 157 (1974). Although the *Scherck* Court enforced an arbitration clause which contained a choice of law provision (Illinois law), the focus of the opinion is almost exclusively on the validity of the *arbitration* provision. Nowhere in the opinion is it suggested that a choice of law clause invariably trumps the public policies underlying the securities laws. In any event, Illinois law is certainly adequate

(continued...)

We are concerned in the present case that the Roby Names' contract clauses may operate "in tandem" as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations. We are cognizant of the important reasons for enforcing such clauses in Lloyd's' agreements. Lloyd's is a British concern which raises capital in over 80 nations. Its operations are clearly international in scope. There can be no doubt that the contract clauses mitigate the uncertainty regarding choice of law and forum inherent in the multinational affairs of Lloyd's. Comity also weighs in favor of enforcing the clauses. Yet we do not believe that a United States court can in good conscience enforce clauses that subvert a strong national policy, particularly one that for over fifty years has served as the foundation for the United States financial markets and business community. In this case, the victims of Lloyd's' alleged securities violations are hundreds of individual American investors, most of whom were actively solicited in the United States by Lloyd's representatives. We believe that if the Roby Names were able [*33] to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy. For the reasons set forth in section C below, however, we conclude that the Roby Names have failed to make such a showing.

C. *Availability of Adequate Remedies*

---

[3](...continued)
to protect the substantive rights of Alberto-Culver, the American company that allegedly was defrauded in its purchase of Scherck, a German company. Indeed, viewed practically, the complaint was essentially a breach of contract action masquerading as a statutory misrepresentation claim. The Court could confidently rely on Illinois law to protect any public policy of the United States implicated in that action.

We are satisfied not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted. We address the fraud and misrepresentation claims first.

1. *Fraud and Misrepresentation*

English common law provides remedies for knowing or reckless deceit, negligent misrepresentation, and even innocent misrepresentation. Affidavit of Anthony Colman P 20. Moreover, the Misrepresentation Act of 1967 provides some additional statutory remedies. *Id.* While the Roby Names might have been able to sue "controlling persons" under the United States [*34] securities laws and establish liability without proving reliance, it certainly is not unfair for English law to require proof of actual misconduct and reliance. Furthermore we are skeptical that "controlling person" liability could be established against many of the defendants here. For instance, we question whether the Lloyd's' governing bodies have "control" over other Lloyd's entities in the sense intended under the securities laws. *See, e.g.*, 17 C.F.R. § 230.405 (1992) (defining "control"); *Harrison v. Dean Witter Reynolds*, 974 F.2d 873, 881 (7th Cir. 1992).

In any event, the available remedies are adequate and the potential recoveries substantial. This is particularly true given the low scienter requirements under English Misrepresentation law (*e.g.*, negligence, "innocence"). Moreover, together with the contractual obligations imposing certain fiduciary and similar duties on Members' and Managing Agents, we believe that the available remedies and potential damages recoveries suffice to deter deception of American investors.

In this context we also note that many of the so-called "misrepresentations" the Roby Names allege are really complaints [*35] about the conduct of Lloyd's' affairs rather than complaints about fraudulent reporting. Thus, for instance, while it may be true that the defendants kept insufficient reserves and permitted

"questionable accounting practices," failure to convey this information to the Roby Names is more a violation of the letter of the securities laws than their spirit, because the complaints really address Lloyd's' misconduct *after* securities are sold. We do not believe that these complaints implicate the public policy of the securities laws.

Finally, although, as the Roby Names observe, section 14 of the Lloyd's Act of 1982 exempts the Corporation of Lloyd's (and its officers and employees) from liability, no other entity within Lloyd's is exempt. Moreover, even the Corporation of Lloyd's is not exempt for acts "done in bad faith." Furthermore, as a self-regulating organization, we cannot say that Lloyd's' own bylaws will not insure the honesty and forthrightness that American investors deserve and expect. We conclude that the Roby Names have adequate remedies in England to vindicate their statutory fraud and misrepresentation claims.

2. *Disclosure*

We turn now to address whether adequate [*36] remedies are available to deter issuers from issuing securities without disclosing sufficient information to permit investors to make informed decisions. We believe that this policy concern is somewhat diluted in this case because the SEC consistently has exempted Lloyd's from the registration requirements of the securities laws. Apparently the SEC has decided that Lloyd's' means test meets the requirements of Regulation D. We are extremely reluctant to dispute the SEC's apparent judgment that the Roby Names are sophisticated enough that they do not need the disclosure protections of the securities laws.

In any event, English law in this case provides Lloyd's entities with an adequate inducement to disclose material information to American investors: failure to do so gives rise to liability for breach of contract. For instance, the Members' Agent's Agreement requires each Members' Agent "promptly" to provide Names with a host of information, and to

> disclose . . . in good time *any information* in its possession relating to any of the Contracted Syndicates, or to any syndicate which the Agent has advised the Name to join . . . *which could reasonably be expected to influence [*37] the Name* in deciding whether to become or remain a member of, or to increase or reduce his participation in, any such syndicate, and *use its reasonable endeavors to obtain any such information*.

(emphasis added). Similarly, paragraph 4.2(i) of the Managing Agent's Agreement requires Managing Agents to disclose "in good time" relevant information to the Name or his Members' Agent. The Roby Names, therefore, certainly can allege breach of contract claims under English law. In addition, under their contract Members' Agents owe certain fiduciary duties to Names which provide a further basis for suit.

While we do not doubt that the United States securities laws would provide the Roby Names with a greater variety of defendants and a greater chance of success due to lighter scienter and causation requirements, we are convinced that there are ample and just remedies under English law. Moreover, we cannot say that the policies underlying our securities laws will be offended by the application of English law. In this case, the Roby Names have entered into contracts that require substantial disclosure by both the Members' and Managing Agents. The specter of liability for breach of [*38] contract should act as an adequate deterrent to the exploitation of American investors. The well developed English law of fraud and misrepresentation likewise adequately requires that the disclosure be "fair."

III. *Application of RICO*

That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the Roby Names' contract clauses must be enforced. As we have explained, the Roby Names have adequate potential remedies in England and there are significant disincentives to deter English

issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

CONCLUSION

For the foregoing reasons we hold that the Roby Names' contract clauses cover the scope of, and the parties named in, the complaint and that the Roby Names have remedies under English law adequate not only to vindicate their substantive rights but also to protect the public policies established by the United States securities laws.

The judgment and order of the district court are affirmed.

APPENDIX D

APPENDIX D

District Court Opinion and Order Dated June 12, 1992

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN S. ROBY, et al.,

Plaintiffs,

-against-

THE CORPORATION OF LLOYD'S a/k/a THE SOCIETY AND COUNCIL OF LLOYD'S d/b/a LLOYD'S OF LONDON, et al.,

Defendants.

---

91 Civ. 7081 (MEL)

796 F. Supp. 103; 1992 U.S. Dist. LEXIS 8210; Fed. Sec. L. Rep. (CCH) P96,825

June 12, 1992, Decided
June 12, 1992, Filed

COUNSEL: [**1] APPEARANCES: PROSKAUER ROSE GOETZ & MENDELSOHN, ESQ., 1585 Broadway, New York, New York 10036,
Attorneys for Plaintiffs,
Of Counsel: DALE A. SCHREIBER, ESQ., MINNA SCHRAG, ESQ., STEVEN B. FEIGENBAUM, ESQ., BRUCE E. LOREN, ESQ.

CAHILL GORDON & REINDEL, ESQ.,

80 Pine Street, New York, New York 10005,
Attorneys for "Syndicate Defendants",
Of Counsel: CHARLES A. GILMAN, ESQ., ROBERT A. ALESSI, ESQ., ADAM LIPTAK, ESQ.

JUDGES: Lasker

OPINION BY: MORRIS E. LASKER

OPINION: [*103] OPINION

LASKER, D.J.

This action alleges violations of the federal securities laws and RICO[1] against various entities which are part of the enterprise known as Lloyd's of London. The 91 investor-plaintiffs allege that solicitation of investor/underwriters in the United States by Lloyd's agents constitutes "sale of securities" and that Lloyd's syndicates are "issuers" within the meaning of the securities laws. They assert that they were deceived as to, *inter alia*, the types of risks assumed by, and the experience of the underwriters of, the syndicates in which they invested. The syndicates are groups of [*104] insurer-investors which are organized for the purpose of assuming insurance risks.

[**2]

The Syndicate Defendants move to dismiss the action as to them pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Fed. R. Civ. P., on the ground that they are not legal entities capable of being sued. The dispositive question is whether a syndicate exists as a separate legal entity apart from the investors in the syndicates (who are generally known as Names); or whether, as the syndicates claim, they are merely "groupings" of individual Lloyd's underwriters who severally undertake insurance obligations.

---

[1] The RICO counts are predicated exclusively on the alleged securities violations.

The syndicates contend that the law of England controls the question of their legal existence -- England being the syndicates' home jurisdiction and the forum designated under plaintiffs' various agreements with the Lloyd's community --, or failing that, that the law of New York, the situs of this action, controls. The plaintiffs submit that federal law, in particular the Securities Act of 1933 and the Securities and Exchange Act of 1934 in combination with Fed. R. Civ. P. 17(b), controls.

The syndicates' motion is granted.

I.

Lloyd's of London is a venerable institution, dating back to the latter part of the seventeenth century, long known for its insurance [**3] business. Although Lloyd's is generally considered to be a unitary organization, it actually is not, and in fact bears little resemblance to the typical corporate insurer. It issues no insurance policies. Rather, it acts as a market for the buying and selling of insurance risks.

According to the syndicates, the closest American analogue to Lloyd's is the New York Stock Exchange. Lloyd's provides the premises, administrative staff and support services for the market; it also issues rules and regulations and monitors transactions that occur in the market. Like the New York Stock Exchange, Lloyd's does not participate in individual decisions made by its brokers, members or underwriters.

The persons who carry on the business at Lloyd's are, respectively, the brokers, active underwriters, member's agents, managing agents, and Names (who make up the syndicates). The Names are the individual investors. They pay fees and delegate complete authority to conduct Lloyd's affairs to "member's agents." Although Names are the ultimate underwriters of the insurance, they do not participate actively in the underwriting process or in the recruiting of other Names to the syndicates. They have no management [**4] authority and cannot bind their fellow members or the syndicate. Membership in a Lloyd's

syndicate is personal and not transferable and terminates upon the death of the member.

Member's agents recruit new Names and handle the admission of Names to Lloyd's membership. Member's agents are ordinarily also chosen to act as Names' underwriting agents[2] and, in that role, are responsible for placing Names in syndicates. In connection with the latter, the member's agent contracts with a "managing agent" to place the member in a group comprised of two to several hundred other Names. These groups constitute the syndicates. Managing agents run the syndicates. They hire the syndicate's active underwriter and maintain the syndicates' accounts and other records, among other things.

An employee of the managing agent, known as the "active [**5] underwriter," acts on behalf of the Names in a syndicate in the "buying" and "selling" of insurance risks; Active underwriters are seated on the underwriting floor at Lloyd's in London. Brokers approach the active underwriter at his desk -- in Lloyd's parlance "the box" -- to solicit the underwriter's agreement to accept a risk. The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will [*105] assume. *See Syndicate 420 at Lloyd's London v. Early American Insurance Co. Ltd*, 796 F.2d 821, 824 (5th Cir. 1986).

Through their syndicates, Names subscribe to a certain percentage of the risk on policies, in return for a certain percentage of the premium paid to the syndicate by the insured. Normally, syndicates do not insure 100% of a risk. Rather, a number of syndicates agree to subscribe, each assuming a specified portion of the total risk. A syndicate member is entitled to a specified

---

[2] Managing agents, discussed below, can also be chosen to act as the Names' underwriting agents to perform the function of placing Names in syndicates, but ordinarily a member's agent is chosen.

(contracted-for) share of the profits from the syndicate's business and is responsible for that share of loss only.

Although Names have unlimited personal [**6] liability for their respective share of the risk, a Name has no responsibility whatsoever for the liability of his fellow syndicate members. Section 8(i) of the Lloyd's Act of 1982 states:

> An underwriting member shall be a party to a contract of insurance underwritten at Lloyd's only if it is underwritten with several liability, each underwriting member for his own part and not one for another and if the liability of each underwriting member is accepted solely for his own account.

In addition, when a Name becomes a member of a syndicate, the contract he or she signs specifies that

> [nothing in his or her agreement with the relevant member's agent or managing agent] shall constitute a partnership between the Name and the Agent or between the Name and any or all of the other members of the Contracted Syndicates.

Schedule 1, Clause 16.1, Lloyd's Byelaw No. 8 of 1988 Agency Agreements.

> Nothing in this Agreement shall constitute any partnership between . . . the Name and any other person or persons whomsoever . . . .

Schedule 1, Clause 20, to Lloyd's Byelaw No. 1 of 1985 Agency Agreements.

Syndicates exist for one year, at the end of which they are dissolved and reconstituted. [**7] However, although syndicates are identified by numbers (*e.g.*, Syndicate No. 670), the numbers are often reused from year to year and often, at their option, many of the same Names remain members. The Names elect each year

which syndicates they wish to join. A syndicate closes its accounts for a given year by transferring its potential liabilities to the members of the syndicate in the following year of account, a practice called "reinsurance to close," and the same managing agents usually run the syndicates from year to year.

There are approximately 365 syndicates in the Lloyd's system. 300 of them, identified by numerical reference in the caption to the complaint, are named as defendants in this action. They are the syndicates to which the 91 plaintiff-investors belonged.

II.

The Syndicate Defendants argue, and ordinarily it would be the case, that either English or New York law controls as to the legal status of the syndicates. It is syndicates' position that their legal status in England is controlling on the issue of whether they are amenable to suit here and that New York law, if it applies, supports their position. However, according to plaintiffs, federal law controls [**8] and that federal law is said to be found in the Securities Acts together with the provisions of Fed. R. Civ. P. 17(b). In brief, plaintiffs assert that Congress legislated that "persons" that are "issuers" are subject to the Securities Act of 1933 and the Securities and Exchange Act of 1934 and automatically have legal existence. Plaintiffs contend that Fed. R. Civ. P. 17(b) makes clear "the rule-maker's goal of removing any procedural obstacles to fulfillment of Congress's intent." (Letter to Court from Plaintiffs' Counsel (March 26, 1992)).

We conclude that English law applies, but whether the test be under English or New York or federal law, the syndicates do not have legal existence.

III.

It is undisputed that under the law of England, the syndicates do not constitute legal entities. Plaintiffs themselves [*106]

have submitted a barrister's affidavit that squarely concedes the proposition:

> As a matter of law, English courts would be bound to treat the syndicates as unincorporated groups of separate traders, without legal personalities, that could not be sued other than by proceeding against all their individual members or against a representative member or members.

Affidavit [**9] of Anthony Colman, ¶ 28. Plaintiffs concede that under English common law, the syndicates would not be amenable to suit under any claims plaintiffs might bring in the United Kingdom. All of the literature concerning Lloyd's defines syndicates as a group of Names on behalf of whom an underwriter accepts insurance business. Standard reference works are replete with comments such as the following: "a syndicate is not a legal entity;"[3] "all Names are . . . sole traders;"[4] "the syndicate itself is not an insuring entity, simply an 'annual venture' between individual Names;"[5] and "Lloyd's structure [is] of a Society of Names trading as sole traders."[6] Furthermore, the informational packets provided to the prospective Names -- and thus every plaintiff-investor here --, as well as the membership documents

---

[3] J. Cowen, *Lloyd's Regulatory Requirements* (Chartered Insurance Institute 1991) (glossary).

[4] Stephen Lewis & Jan Woloniecki, "Lloyd's: The Market Structure," *in Lloyd's, the ILU and the London Insurance Market*, at 39 (PLI Comm. L. & Prac. No. 472 1988). [**10]

[5] *Lloyd's: A Route Forward* (1992) (a task force report).

[6] *Id.*

signed by each Name, specify that syndicates are not legal entities.[7]

If English law applies, therefore, the syndicates' motion must be granted.

* * *

To become a Name, an individual must be nominated and seconded and have established certain minimum financial net worth tests. Under Lloyd's bylaws, the Name is required to travel to London to submit to an interview at Lloyd's. Upon acceptance into the society of Lloyd's, the individual executes a number of documents, among which are the premium trust deed, a member's agent agreement, and a managing agent agreement. Each of the documents provides that it is to be governed by the law of England. Each by its terms provides for dispute resolution either in the courts or in arbitration, as the document may be, in England. There are presently approximately 26,000 names world-wide; 21,000 plus, [**11] or 80 percent, are English citizens. The syndicates argue that because the English Names vastly predominate in the group, because the documents which they execute specify the application of English law and the disposition of disputes in England, and because the documents were all executed in England, English law applies.

In addition, this outcome makes particular sense in this case, according to the syndicates, because it involves agreements with Names throughout the world. As the syndicates reasonably note, it would destroy uniformity of treatment and undermine commercial stability if the determination of the legal existence of

---

[7] The membership brochures state:

> A syndicate is not a legal entity. Each member of the syndicate is responsible only for the proportion of business written on his behalf. It is a matter of each for his own part and not one for another.

the Lloyd's syndicates depended on the fortuitous fact of where a Name's lawyer's office was located, which Name sues, where he or she sues, or what cause of action he or she sues on.

In *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 698 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 29 L. Ed. 2d 680, 91 S. Ct. 2205, (1971), the court, quoting then District Judge Mansfield, held that the legal existence of a foreign corporate entity "must be determined by the laws of the country where it has been created and continues to exist." *Id.*[8] It [**12] is true that the [*107] quoted statement in *Carl Zeiss* was dicta with regard to legal existence because the sole issue there was that of identity between successor entities. Nevertheless, the rule enunciated is still persuasive authority.

New York choice of law rules would reach the same result. In choice of law cases, New York courts apply the criterion of "interests analysis," under which "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation," controls. *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 581 N.E. 2d 1042, 575 N.Y.S.2d 796 (Ct. App. 1991). [**13] Under this standard, because Lloyd's is based in London and approximately 80% of the Names are English citizens, English law governs.

IV.

---

[8] *Carl Zeiss* states:

> the legal existence, status, identity, and domicile of a foreign corporate entity or juristic personality, such as the Foundation here, must be determined by the laws of the country where it has been created and continues to exist.

Id. (quoting the district court decision by Judge Mansfield, 293 F. Supp. 892, 898 (S.D.N.Y. 1968)).

Although I conclude that English law governs, the application of substantive New York law would result in the same outcome.

This court has previously considered the question whether syndicates qualify under the New York statutory definition of "unincorporated associations," which is the only possible legal classification the syndicates could belong to, since they are neither corporations, partnerships nor individuals.[9] In *Bobe v. Lloyd's*, 27 F.2d 340, 345 (S.D.N.Y. 1927), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), the court held that the syndicates do not constitute unincorporated associations within the meaning of Section 13 of the New York General Associations Law, the controlling provision. In *Bobe*, a Special Master considered the issue of the syndicates' legal existence under New York statutory law and held, in a report which the court confirmed, that Lloyd's syndicates were not unincorporated associations under New York law, after noting that the Names' "libility was several, not joint, and [**14] that each underwriter was obligated only for the amount of his individual underwriting irrespective of the obligation of any of the other underwriters." *Id.*

---

[9] Plaintiffs more or less concede that the syndicates are not partnerships which would appear to be an obvious conclusion since syndicates lack the essential characteristic of a partnership -- joint liability. However, in a footnote to their brief, they remark:

> Although ostensibly Names are not jointly and severally liable for syndicates' debts, discovery may show that the syndicates are also partnerships by estoppel under Section 27 of the New York Partnership Law, at least for purposes of their transactions in the United States.

No indication whatsoever has been provided as to what type of evidence plaintiffs expect to uncover through discovery that might establish a relationship of "partnerships by estoppel."

Plaintiffs argue that the first *Bobe* decision, 10 F.2d 730 (2d Cir.), *cert. denied*, 270 U.S. 663, 70 L. Ed. 788, 46 S. Ct. 472, (1926), [**15] not the *Bobe* decision cited by the syndicates, 27 F.2d 340, 345 (S.D.N.Y. 1927), *aff'd per curiam*, 27 F.2d 347 (2d Cir. 1928), is controlling as to the syndicate's legal existence. In the first decision, according to plaintiffs, the Second Circuit remanded for additional fact-finding on the issue of whether service of process was properly made on the treasurer or the president of the syndicates. The plaintiffs add that there would have been no need for remand as to service of process if the record before the Second Circuit had not been sufficient to establish that syndicates were unincorporated associations under Section 13. Plaintiffs' position is misguided for two reasons. *First*, the earlier *Bobe* decision did not rule that the syndicates were unincorporated associations but only that the allegations of the complaint properly alleged them to be unincorporated associations. *Second*, the later and final *Bobe* decision specifically held at the District Court level, after fact-finding, that the syndicates were not unincorporated associations, and this decision was affirmed without opinion by the Court of Appeals.

V.

As indicated [**16] above, plaintiffs take the position that United States law controls. They argue that the Securities Acts together [*108] with Fed. R. Civ. P. 17(b) establish the legal existence of the syndicates.

A. Plaintiffs' contentions under securities laws

As we understand plaintiffs' argument, which in our eyes is particularly convoluted,[10] it is that the only question before the

---

[10] The following excerpt from the letter of plaintiffs' counsel to the Court, dated March 26, 1992, in response to the Syndicate Defendants' rely brief, sets forth plaintiffs' theory:

(continued...)

Court is whether the syndicates constitute "persons" under the federal securities laws. They argue that, as issuers of securities, the syndicates are by definition, that is, without more, suable under the United States securities laws. But this argument begs the very question which must be decided. In *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992), the Eleventh Circuit explicitly rejected a similar contention:

> The question here is not whether the Jefferson County Sheriff's Department is a 'person' for purposes of

---

[10](...continued)

> What plaintiffs allege is that the syndicates' liability here derives from their status as issuers of securities under the federal securities laws. The syndicates' legal existence and amenability to suit here rest not on Rule 17(b), but on Congress's creation of that very class of entities -- issuers of securities. Under plaintiffs' analysis, for purposes of this motion, the only question before the Court is whether the syndicates are issuers -- that is whether they constitute "persons" under the federal securities laws and whether they "issue or offer to issue" securities. Whether the syndicates constitute "persons," in turn, depends on whether they are "unincorporated associations" (under the Securities Acts) or "organized groups of persons whether incorporated or not" (under the Securities and Exchange Act). Plaintiffs do not contend that Rule 17(b) gives the answer to that question. Rule 17(b) simply shows which substantive law -- state, federal or foreign -- does. Here, where plaintiffs allege federal securities law violations, Congress has answered that question in the securities laws by declaring that the syndicates may be sued for issuing securities in violation of the federal securities laws. Rule 17(b) merely clarifies the rule-makers' goal of removing an procedural obstacles to fulfillment of Congress's intent.

> liability under *Monell* and section 1983, but whether the Department is a legal entity subject to suit.

951 F.2d at 1214.

[**17]

The American legal system distinguishes between the concepts of causes of action, on the one hand, and persons who can be sued, on the other. The Securities Acts, supplemented by judicial decisions, do, of course, create various causes of action. But nowhere do they purport to confer legal existence. The Securities Acts provide only that "issuers" are persons who issue securities, and "persons" include "unincorporated associations"[11] or "organized group of persons,"[12] but these provisions do not solve the problem posed by this case because they give no definition of what constitutes an "unincorporated association" or "organized group of persons," and the cases which plaintiffs rely upon for such further definition do not deal with the Securities Acts or their terminology.

United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922), [**18] is a case upon which plaintiffs place substantial reliance. There, the Supreme Court held that unincorporated labor unions, such as the United Mine Workers of America, and its district and local branches -- recognized as distinct entities by numerous acts of Congress, as well as by the laws and decisions of many states -- were suable under the Sherman Act. However, the Sherman Act, in contrast to the Securities Acts, includes a precise definition of the extent to which an association or group might be held liable as a "person" under the act:

---

[11] Section 2(2) of the Securities Act, 15 U.S.C. § 77b(2).

[12] Section 3(a)(9) of the Securities and Exchange Act, 15 U.S.C. § 78c(9) and section 3(a)(19), 15 U.S.C. § 78c(19).

> § 7. "Person" defined
>
> The word "person", or "persons", wherever used in sections 1 to 7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. [*109]

Sherman Act, 15 U.S.C. § 7. The securities laws provide no such guidance as to who can be sued under them. Plaintiffs themselves concede that neither the Securities Act of 1933 nor the Securities and Exchange Act of 1934 defines an "unincorporated association" and rely on federal judicial decisions to provide the definition [**19] of that term, but, as stated above, the cited decisions do not construe the Securities Acts.

Moreover, no provision of the Securities Acts indicates a legislative intent to confer legal existence on any entity that was not suable prior to enactment of the Securities Acts, and plaintiffs point us to no authority, either in the legislative history of the Acts or judicial decisions, which supports their argument.

Finally, whatever authority there is as to whether the syndicates are "issuers" altogether undermines the plaintiffs' position and specifically the position of the named plaintiff in this case. In a letter to Congressman Don J. Pease of the United States House of Representatives from Mary E. T. Beach, Senior Associate Director of the SEC, dated August 5, 1991, in response to a letter from him forwarding questions raised by his constituent, John S. Roby (the lead plaintiff here), Ms. Beach states:

> The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 . . . and the Securities and Exchange Act of 1934 . . . to the solicitation of U.S. Citizens to participate [**20] in Lloyd's. It is the Division's position that the solicitation of participations involves

> the sale of a security, with the issuer of that security being the particular Members' Agent [not the syndicate] involved.

Thus such authority as there is refutes the argument that, in plaintiffs' words, Congress "deemed" syndicates to be among the class of possible defendants under the federal securities laws.

B. Plaintiffs' contentions under Rule 17(b)

Rule 17(b) provides in pertinent part:

> *Capacity to Sue or be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, *except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws [**21] of the United States*, ... (emphasis added).

Plaintiffs argue that because they "have sued the syndicates only under the federal securities and RICO laws, and hence seek to enforce only federal substantive rights, the syndicates' capacity to be sued is governed by Fed. R. Civ. P. 17(b)." As the plaintiffs' counsel states in his letter to the court of April 2, 1992:

> in promulgating Fed. R. Civ. P 17(b) in 1937, the Supreme Court consciously acted to federalize the definition of an 'unincorporated association' where, as here, Congress through specific legislation intended to render an unincorporated association subject to suit, notwithstanding any contrary bar or absence of

> authority under otherwise applicable law, whether state or foreign.

The Syndicate Defendants respond that plaintiffs' theory is analytically flawed. They contend that, as a rule of civil procedure, Rule 17(b) confers no substantive rights and is not triggered until a Court has first made the threshold determination that the party in question is a legal entity. They maintain that Rule 17(b) does not purport to, and cannot constitutionally, establish the legal existence of a particular entity. Creation [**22] of a legal entity, other than an individual, according to the syndicates, can be accomplished only by legislation, not by a rule of procedure.

[*110] **1. Legal existence and capacity to sue and be sued are distinct concepts on their face**

Capacity to be sued and legal existence are separate and distinct concepts. Both capacity to be sued and legal existence are prerequisites to the suability of an entity, but Rule 17(b) speaks only to capacity to sue or be sued.

That legal existence and capacity to be sued are distinct concepts is made clear by the language of Rule 9(a) of the Fed. R. Civ. P. which specifically distinguishes between the "legal existence of any party," on the one hand, and "the capacity of any party to sue or be sued," on the other.[13] Judicial decisions -- even those cited by plaintiffs -- demonstrate that Rule 17(b) addresses only the question of capacity to sue or be sued. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 858, 865-66 (S.D.N.Y. 1990) (treating issue of legal existence and capacity to sue separately), *vacated on other grounds*, 937 F.2d 44

---

[13] Rule 9. *Pleading Special Matters*

> (1) *Capacity*. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. . . .

(2d Cir. 1991) (on other grounds); *Associated Students v. Kleindienst*, 60 F.R.D. 65, 67 (C.D. Cal. 1973) [**23] (same).[14]

[**24]

Put another way, the reach of Rule 17(b) is limited to providing that partnerships or other unincorporated associations which have no capacity under state law to sue or be sued may nevertheless sue or be sued in their common name in federal court for the purpose of enforcing for or against them a substantive right existing under the Constitution or laws of the United States, but Rule 17(b) does not confer legal existence or create new types of legal entities.

Plaintiffs contend that formal organization or compliance with an organizational statute is not required to permit an unincorporated association to be sued on a federal question. But "unincorporated association" is a term of art -- every group that is

---

[14] Plaintiffs refer to *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922), *supra*, and an article written by Dean (later Judge) Clark and Professor Moore, "A New Federal Procedure -- II. Pleading and Practice," 44 Yale L.J. 1291, 1312-17 (1935), interpreting the Federal Rules of Civil Procedure prior to their adoption. In these works, there is at times a lack of clarity concerning a distinction between the concepts of "legal existence" and "capacity to sue or be sued" which plaintiffs contend proves their point that Rule 17(b) performs the function of providing for both concepts (or that the two concepts are identical). But regardless of what Clark and Moore in their article may or may not say, there is no question that courts have consistently recognized a distinction between the concepts of legal existence and capacity to sue or be sued in the interpretation of Rule 17(b). *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990), *vacated*, 937 F.2d 44 (2d Cir. 1991) (on other grounds); *Associated Students v. Kleindienst*, 60 F.R.D. 65, 67 (C.D. Cal. 1973).

not a corporation or partnership is not automatically an unincorporated association. "It is well settled that it must appear that an association, if it is not a corporation, has received by appropriate legislation a legal status before it, or its members, may be sued in the name of the group." *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 351, 66 L. Ed. 975, 42 S. Ct. 570, (1922). Plaintiffs have failed to establish that the syndicates are unincorporated associations under any [**25] possibly applicable law -- English, federal or New York State -- and indeed English and New York law are directly to the contrary.

2. Legal existence is a substantive proposition that cannot be controlled by a rule of procedure

A further proposition which undermines the plaintiffs' contention that Rule 17(b) confers legal existence on the syndicates is that to do so would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that the Federal Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." As the United States Supreme Court has construed the Rules Enabling Act:

> An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to [*111] enlarge that jurisdiction; and the Act . . . authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

United States v. Sherwood, 312 U.S. 584, 589-590, 85 L. Ed. 1058, 61 S. Ct. 767, (1941). The syndicates submit that if Rule 17(b) were construed to create a legal entity, the court would be performing [**26] a legislative rather than a judicial function. That argument has merit.

The plaintiffs acknowledge that if the issue of legal existence is a substantive proposition, Rule 17(b) could not control

it. The plaintiffs, however, take the position, without citing any authority, that the question of legal existence is procedural, not substantive. While the authority on the point is slim -- perhaps because the answer to the question is obvious --, it favors the syndicates' position. For example, in his discussion of the subject in *Busby v. Electric Utilities Employees Union*, 323 U.S. 72, 76-77, 89 L. Ed. 78, 65 S. Ct. 142, (1944) (concurring), Justice Frankfurter distinguishes between "suability" and "status" and characterizes "suability" as a "procedural matter" and "determination of status" as a "substantive issue." *Id.*

C. Plaintiffs' miscellaneous contentions

In a number of cases in the United States, syndicates have been sued and been treated as legal entities, and some syndicates have themselves sued or asserted counterclaims. Plaintiffs argue that such actions and determinations contradict the syndicates' claim of nonexistence. However, in none of the cases referred to was the question [**27] of the syndicates' legal existence ever raised, nor is there any assertion that any syndicate which is a defendant here was a party to the earlier litigation. The issue of legal existence arose, if at all, only indirectly, in the context of determining what kind of entity a syndicate was for purposes of determining diversity jurisdiction. *See International Insurance Co. v. Certain Underwriters at Lloyd's London*, 1991 U.S. Dist. LEXIS 12,937 (N.D. Ill. 1991) and *Graham v. Lloyd's of London*, 371 S.E.2d 801, 296 S.C. 249 (S.C. App. 1988).

The plaintiffs also suggest that the syndicates must have legal existence because they own property interests in the $9 billion Lloyd's American Trust Fund ("LATF") held by Citibank, N.A., in New York. Even assuming for the moment that the syndicates have an ownership in the funds, plaintiffs have not shown that such ownership would alone confer legal existence upon the syndicates under English, New York or federal law.

Moreover, there is sufficient undisputed material before the Court in the form of affidavits submitted by both sides to support a conclusion that at best the nature of the syndicates' [**28] interest

is not that of an owner or beneficiary but that of a nominee or fund manager. The record is incomplete on this point, but at best what has been presented even by the plaintiffs leaves considerable doubt whether the syndicates own property interests in the LATF. For example, in a post-argument motion filed by the plaintiffs under Fed. R. Civ. P. 56(f) for further discovery on the subject, a supporting barrister's affidavit states: "I would emphasize that there is no money in the LATF that is not Names' money." The direct beneficiaries of the fund appear to be the policy holders, to the extent of their justified insurance claims; the Names having a reversionary interest in any funds left in the LATF after payout of claims.

* * * *

In sum: English law controls, and under English law the syndicates have no legal existence. The result is the same under New York or federal law. Accordingly, the motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is granted. It is unnecessary to determine whether the complaint is defective also under Fed. R. Civ. P. 12(b)(1).

The complaint is dismissed as to the Syndicate Defendants.

It is so ordered.

Dated: June 12, 1992
New York, New York
Morris E. Lasker
U.S.D.J.

APPENDIX E

District Court Memorandum Opinion and Order
Dated August 18, 1992

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

JOHN S. ROBY, *et al.*,

Plaintiffs,

-against-

THE CORPORATION OF LLOYD'S a/k/a
THE SOCIETY AND COUNCIL OF LLOYD'S d/b/a
LLOYD'S OF LONDON, *et al.*,

Defendants.

---

91 Civ. 7081(MEL)

1992 U.S. Dist. LEXIS 12367; Fed. Sec. L. Rep. (CCH) P96,971

August 18, 1992, Decided
August 18, 1992, Filed

SUBSEQUENT HISTORY: As Amended September 3, 1992.

COUNSEL: [*1] PROSKAUER ROSE GOETZ & MENDELSOHN, ESQS., 1585 Broadway, New York, New York, 10036, Attorneys for Plaintiffs, Of Counsel: DALE A. SCHREIBER, ESQ., MINNA SCHRAG, ESQ., STEVEN B. FEIGENBAUM, ESQ., BRUCE E. LOREN, ESQ. MENDES & MOUNT, ESQS., 3 Park Avenue, New York, New York 10016, Attorneys for the "Managing Agents" and their "Chairs of the Board", Of Counsel: DANIEL M. BIANCA, ESQ., LEO W. FRASER, ESQ., WILLIAM A. MEEHAN, ESQ., JEFF J. IMERI, ESQ. LeBOEUF, LAMB, LEIBY & MACRAE, ESQS., 520 Madison Avenue, New York, New York 10022,

Attorneys for Defendants The Society, Council and Corporation of Lloyd's and their Individual Internal Members, Of Counsel: TAYLOR R. BRIGGS, ESQ., SHEILA H. MARSHALL, ESQ., MARY L.B. BETTS, ESQ., STEPHEN H. OREL, ESQ., LOUISE G. CONWAY, ESQ. WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, ESQS., 150 East 42nd Street, New York, New York 10017, Attorneys for Defendants Members Agents, Of Counsel: THOMAS W. WILSON, ESQ., JONATHAN C. THAU, ESQ., NICHOLAS J. CONCA, ESQ., FRED N. KNOPF, ESQ.

JUDGES: Lasker

OPINION BY: MORRIS E. LASKER
OPINION: LASKER, D.J.

These motions to dismiss the complaint present a knot of venue and arbitration clause questions.

Plaintiffs are American investors who [*2] joined insurance syndicates that underwrote policies issued in England through Lloyd's of London. They now allege violations of American securities laws and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d) (1988 & Supp. 1989), by various persons and entities in connection with their decision to join Lloyd's syndicates. Three motions to dismiss have been brought by various defendants,[1] who assert that this court is an impermissible venue for the suit because plaintiffs entered contracts with the defendants that provide for dispute resolution by arbitration in England and/or the English courts. Defendants argue in the alternative that under the doctrine of *forum non conveniens* the suit must proceed in England even if the arbitration and forum selection clauses do not control.

Defendants' motions are granted.

---

[1] The moving defendants are (1) the Society, Corporation, Committee and Council of Lloyd's and their individual internal members ("Lloyd's"), which are entities or persons that collectively govern Lloyd's of London; (2) the "Members' Agents"; and (3) the "Managing Agents."

BACKGROUND

Lloyd's provides a marketplace and rules pursuant to which individual underwriters such as plaintiffs (known as "Names" or "Members") form insurance syndicates, with each Name subscribing to a certain percentage of the risk on policies issued by the syndicates, in return for a certain percentage of premiums paid by the insured. To become Members of Lloyd's (synonymous with "Names"), investors must meet in London with representatives of Lloyd's, and must sign a "General Undertaking" in which they agree to be bound by English law and to have English courts or English arbitration govern all disputes relating to the Names' membership or underwriting activities at Lloyd's. The Names play no active role in the syndicates' operations. Each syndicate is run by a Managing Agent, with a Members' Agent retained by each Name to represent him or her in dealings with Lloyd's overall and with the syndicates' Managing Agents. Names are exposed to unlimited personal liability for their pro rata share of the obligations of the underwriting syndicates to which they belong, but have no liability for the obligations of their fellow Names.

Plaintiffs are [*4] American citizens and are Names who claim to have incurred severe losses on their Lloyd's underwriting. They allege that Lloyd's and their Managing and Members' Agents solicited their investment in syndicates with false representations downplaying the risks and exaggerating the benefits associated with such investments. These actions, according to plaintiffs, violated American securities laws and RICO. They do not allege that the arbitration and forum selection clauses at issue here were fraudulently induced.

The complicated structure of Lloyd's leads to a number of contractual relationships that pertain to the instant motion, all of which have in common that the parties to each agreement submit to arbitration in England and/or the jurisdiction of English courts over all disputes. The General Undertaking by which investors become Names provides, in relevant part:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably [*5] agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit . . . arising out of or relating to such matters shall be brought in such courts. . . .[2]

Since 1990, when Lloyd's revised the standard agreements between Names and Members' and Managing Agents, each Name also has entered into a "Members' Agent's Agreement" which sets forth the terms of the relationship between Names and Members' Agents. That agreement provides:

> 16.1 . . . Any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and the Name shall be referred [*6] at the request of either party to arbitration in London. . . .
>
> 9.1 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.[3]

---

[2] Undertaking of lead plaintiff John Roby, dated August 22, 1986, Exhibit C to Joint Appendix to Defendants' Motion to Dismiss, March 25, 1992. According to the complaint, Lloyd's requires all Names to sign identical agreements. Compl. ¶ 19.

[3] Affidavit of Anthony Geoffry Cooper, June 2, 1992, Exhibit 6.

Since 1990, the Managing Agents' rights and obligations have been defined by two agreements, known as the Agents Agreement and the Managing Agent's Agreement. The Agents' Agreement is between a Members' Agent and a Managing Agent, and contains standard provisions including:

> 9.1 Any dispute, difference, question or claim relating to this Agreement which may arise between the Members' Agent and the Managing Agent shall be referred at the request of either party to arbitration in London. . . .
>
> 11.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.[4]

The Managing Agent's Agreement defines the relationship of a Name and a Managing Agent, although plaintiffs dispute whether any of them in fact are bound by such an agreement. The Managing Agent's Agreement defines the relationship of the Name and the Managing Agent, and provides:

> 16.1 . . . Any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and the Name shall be referred at the request of either party to arbitration in London . . . .
>
> 19.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.[5]

Before 1990, the Names' relationship with Members' and Managing Agents was defined by different contracts. The pre-1990 Members' Agent's Agreement contained a forum selection clause stating that any dispute "relating to this Agreement" would be subject to arbitration in England, while the Managing Agents were party to

---

[4] Cooper Affidavit Exhibit 4.

[5] Cooper Affidavit Exhibit 5.

a Syndicate [*8] and Arbitration Agreement which provided for arbitration in London of all disputes "in connection with or in relation to the . . . Syndicate . . . or to its constitution or business."

Defendants move for dismissal based on these agreements, as well as on *forum non conveniens* grounds. Despite plaintiffs' energetic opposition, the motions are granted.

DISCUSSION

Plaintiffs offer a variety of arguments against enforcing the arbitration and forum selection clauses, among them that the clauses do not cover the subject matter of plaintiffs' claims; that they do not cover all defendants; and that for reasons of public policy or judicial discretion, the clauses should not be enforced even if this dispute falls within their scope.

The Court of Appeals for the Tenth Circuit recently ruled that the exact forum selection and arbitration clauses in question here were enforceable, and affirmed the dismissal of securities fraud claims brought against Lloyd's and Managing and Members' Agents by an American Name. *Riley v. Kingsley Underwriting Agencies, Ltd.*, No. 91-1311 (10th Cir. Jul. 17, 1992).[6] That well-reasoned opinion sets forth essentially the considerations that warrant dismissal [*9] of this complaint. Moreover, in a briefer treatment, the District Court for the Northern District of Illinois dismissed a similar suit. *See Bonny v. Society of Lloyd's*, No. 91 C 5525, slip op. (N.D. Ill. May 29, 1992). Nevertheless, because the plaintiffs in this case have raised arguments not treated in these rulings and because suits like these remain fairly novel, it is useful to consider the issues at length.

Four Supreme Court opinions of the last twenty years have addressed forum selection and/or arbitration clauses, and consistently

---

[6] Unlike this suit, *Riley* did not involve a RICO claim, but its analysis applies fully here.

have viewed such clauses favorably, particularly in cases involving international commerce. *See Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). [*10] The Court has noted that such agreements provide "the orderliness and predictability essential to any international business transaction", and that "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.

Accordingly, forum selection clauses are to be enforced unless the party opposing enforcement "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud and overreaching." *The Bremen*, 407 U.S. at 15 (1972) (enforcing forum selection clause conferring jurisdiction on English courts, although the American plaintiffs' claim likely was barred by a waiver they had signed that was enforceable under English law but not under American law). *See also Seward v. Devine*, 888 F.2d 957, 962 (2d Cir. 1989) (enforcing forum selection clauses where "no indication that enforcement of the clauses would be unreasonable or unjust"). Although *The Bremen* [*11] stressed the likelihood that the forum selection clause was actively negotiated by the parties, *see* 407 U.S. at 13, later cases have enforced forum selection clauses even in form contracts where the forum provision was not negotiated. *See Carnival Cruise Lines*, 111 S.Ct at 1527.

Arbitration agreements are governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and by the Convention of the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, TIAS 6997, 330 U.N.T.S. 38 (1970) (Convention) (codified at 9 U.S.C. §§ 201-208). The Act provides:

> [A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out

> of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The Convention, to which both the United States and Great Britain are signatories, provides:

> Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration [*12] all or any differences which have arisen or which may arise between them in respect of a defined legal relationship . . . .

Convention Art. II(1). Such agreements "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* Art. II(2).

In practice, the enforceability of arbitration clauses in international commercial agreements has depended in large part on a analysis similar to that of the forum selection clause cases; in both *Scherk* and *Mitsubishi* the Supreme Court enforced arbitration clauses and relied substantially on *The Bremen,* a pure forum selection clause case. *See Scherk,* 417 U.S. at 518; *Mitsubishi,* 473 U.S. at 629-630. The Court in *Scherk* noted, "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." *Id.* at 519. The policy favoring arbitration clauses is so strong in the context of international commercial agreements that they are enforced "even [*13] assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi,* 473 U.S. at 629.

A. Forum Clauses Govern Plaintiffs' Claims Against Each Defendant

Plaintiffs argue that by their own terms the clauses in question here cover neither the subject matter of their claims or certain defendants named in this suit. They contend that the forum selection clauses to which they agreed "do not apply to claims under the federal securities laws or RICO," Pl. Br. at 33, because "the clauses are limited either to contract disputes arising under the agreement in which they are contained, or to claims recognized under English law." They contend further that their claims against the Managing Agents should survive for want of evidence that the operative contracts in fact were executed, and because, even if those contracts were executed, they are illusory and therefore unenforceable. Finally, plaintiffs assert that individual officers of the Members' and Managing Agents have not entered any agreements with the plaintiffs, and therefore cannot enforce the forum selection and arbitration clauses.

1. Applicability of Agreements to Various Defendants [*14]

The recent Tenth Circuit decision in *Riley* did not discuss the scope or applicability of the agreements, but was premised on the applicability of the arbitration and forum selection clauses of each agreement to Lloyd's and to the defendant Managing and Members' Agents. *See Riley, supra,* slip op. at 7-8.

Plaintiffs' attempt to identify certain individuals or classes of defendants not covered by the forum selection and arbitration clauses is not persuasive. Although plaintiffs struggle to identify parties somehow involved with Lloyd's with whom plaintiffs have not signed a contract and argue that those parties cannot benefit from the forum selection or arbitration clauses, the import of every contract plaintiffs entered is identical: plaintiffs agreed to submit to English law, English courts and/or English arbitration to resolve any disputes arising from or related to their investment in Lloyd's syndicates. All

defendants named in this suit either are protected directly by the clauses or are intended beneficiaries entitled to enforce them.

Even if it stood alone, the General Undertaking agreed to by plaintiffs at the time they became members of Lloyd's would reach claims [*15] against all defendants. That Undertaking, which apparently was not amended in 1990 and was signed by each plaintiff as a prerequisite of his or her membership in Lloyd's, contains an extremely broad, specific forum selection clause by which plaintiffs agreed "irrevocably . . . that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's . . . ." General Undertaking Clause 2.2. All the defendants in this case are alleged somehow to have duped plaintiffs into becoming Members of Lloyd's, a subject that certainly "relates to the Member's membership of" Lloyd's. Thus even defendants not directly a party to the Undertaking are protected by the plain meaning and intent of the Undertaking, which is to force all claims concerning membership in Lloyd's to be brought in England.

It is true that the General Undertaking, unlike the Members' and Managing Agents' Agreements, does not itself contain an arbitration clause, and accordingly cannot provide an independent basis for arbitration in England. However, the very question [*16] whether Managing Agents themselves or the officers of Members' and Managing Agents are entitled to enforce arbitration clauses is itself a question relating to plaintiffs' membership in Lloyd's within the meaning of the General Undertaking, and accordingly must be litigated in England.

Moreover, the plaintiffs' arguments as to the applicability and enforceability of other forum selection and arbitration clauses to specific defendants only are not persuasive. The Managing Agents argue with considerable force that whether or not each plaintiff executed an Agreement with each Managing Agent, the parties nevertheless have sufficiently evinced their mutual intent to be bound

directly by the Managing Agent's Agreement arbitration clause, and therefore are obliged to arbitrate their differences in England.

Whether or not plaintiffs and the Managing Agents can be said directly and mutually to have agreed to the terms of the Managing Agent's Agreement, the interrelated set of agreements which plaintiffs entered to become Members in Lloyd's establishes in several ways their acceptance of arbitration of disputes with Managing Agents. Plaintiffs do not dispute that they executed the standard [*17] Members' Agent's Agreements, in which they authorize their Members' Agents to enter into the standard Managing Agent's Agreement. *See* Members' Agent's Agreement, Cl. 2.2(b), Defendant's Joint App. of April 1, 1992, Ex. B. In turn, the standard Managing Agent's Agreement, which was appended to the Members' Agent's Agreement, includes arbitration clauses. *See* Standard Managing Agent's Agreement, Cl. 6, 9.1, Schedule 3 to Ex. B of Defendants' Joint App. Accordingly, even if they did not enter agreements directly with Managing Agents, they duly authorized Members' Agents to do so on their behalf, and Members' Agents did so.

Names also agreed in Article 1 of the General Undertaking to abide by all Lloyd's byelaws. These include a provision prohibiting Names from underwriting insurance other than pursuant to the terms of the standard agreements, which, as discussed above, contain arbitration clauses.

The conclusion that plaintiffs are bound by the Managing Agent's Agreement is confirmed by the fact that their complaint relies at least in part on that Agreement to define the duties owed them by the Managing Agents. *See* Compl. P 25. It goes without saying that plaintiffs [*18] cannot both complain of the failure of Managing Agents to perform duties imposed by a contract and simultaneously protest that they are not bound by the terms of the very same contract.

Finally, plaintiffs' objection that the Managing Agents' Agreements are unenforceable as illusory or lacking mutuality of

obligations is without merit. The agreement recites real and mutual obligations of each party, such as the Managing Agent's obligations to manage the syndicate, and the Name's financial obligations to the Managing Agent. At the very least, Lloyd's byelaws require both Names and Managing Agents to abide by the terms of the standard agreements, including arbitration clauses, sufficiently obligates each party to the Agreement's terms, and renders the contracts valid.

* * * *

Plaintiffs' arguments that the individually named Chairs of Members' and Managing Agents are not protected by the forum selection and arbitration clauses are even less persuasive. The violations that the Chairs are alleged to have committed are not independent of those alleged to have been committed by the Agents themselves, and all arise out of the Chairs' performance of their duties as employees or officers [*19] of entities with whom plaintiffs contracted. Accordingly, even if the Chairs are not parties to the operative agreements (a premise which is in doubt), they benefit from them as much as their employers. *See Scher v. Bear Stearns & Co.*, 723 F. Supp. 211, 217 (S.D.N.Y. 1989); *Brener v. Becker Paribas, Inc.*, 628 F. Supp. 442, 451 (S.D.N.Y. 1985).

2. Substantive Scope of Agreements

Plaintiffs maintain that the Members' and Managing Agents' Agreements cover only contractual disputes concerning the parties' obligations, and have no bearing on securities fraud or RICO claims like those here.

It is of course true that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986), and that a party cannot be bound by a forum selection clause that does not reach the dispute at hand. However, arbitration agreements are to be construed "as broadly as possible," *S.A. Mineracao Da Trinidade-Samitri v. Utah Int'l. Inc.*, 745 F.2d 190, 194 (2d Cir. 1984), and "arbitration should be ordered

[*20] unless it may be said with positive assurance that the arbitration clauses is not susceptible of an interpretation that covers the asserted dispute." *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 847 (2d Cir. 1987).

Numerous courts have held fraud claims to be governed by arbitration clauses similar to those here. *See, e.g., Meadows Indem. Co. v. Baccala & Shoop Insurance Services, Inc.*, 760 F. Supp. 1036, 1044-1045 (E.D.N.Y. 1991) (fraud claims governed by provision that "any dispute arising out of this contract shall be submitted to a board of arbitration"). *See also S.A. Mineracao, supra,* and *Genesco, supra.* Moreover, as noted above, the Tenth Circuit in *Riley* accepted without discussion that the arbitration and forum selection clauses in question here applied to securities fraud claims, and limited its discussion to whether the provisions were consistent with public policy and were otherwise enforceable. *See Riley, supra,* slip op. at 7-8.

In light of this strong authority, the relevant provisions here must be enforced. The provisions all are broadly stated. The arbitration clauses [*21] in the Managing and Members' Agents Agreements apply to "any dispute, difference, question or claim relating to" each agreement. The forum selection clauses provide for exclusive English jurisdiction "for all purposes of and in connection with" the agreements. The Syndicate and Arbitration Agreement has the same limitations. The General Undertaking also provides for exclusive English jurisdiction over disputes "arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's."

Although the General Undertaking employs different language than the Members' and Managing Agents' Agreements (the latter contain identical forum and arbitration provisions), the latter agreements' relevant clauses do embrace plaintiffs' securities fraud and RICO claims. Claims that defendants deceptively enticed plaintiffs into becoming Names and underwriting insurance at Lloyd's

without question "arise out of or relate to [plaintiffs'] membership of" Lloyd's.

Plaintiffs claim that because the General Undertaking specifies that it is to be "governed by and construed in accordance with the laws of England," plaintiffs' uniquely American securities fraud and [*22] RICO claims do not fall within even the broad forum selection clause of the General Undertaking. However, the mere fact that the parties specify which body of law is to govern their future disputes does not imply that the assertion of claims not recognized by that body of law can trump the choice of law provision. That result would eviscerate such provisions. As noted above, the Supreme Court has held arbitration clauses to be enforceable "even assuming that a contrary result would be forthcoming in a domestic context." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). The rule applies here with equal force, and accordingly the General Undertaking forum selection clause governs plaintiffs' securities fraud claims.

Plaintiffs' claims also are a "dispute, difference, question or claim relating to" the relationship and obligations of plaintiffs and their Agents, which is the subject matter of the agreements on which Managing and Members' Agents rely. With regard to this provision, the heart of plaintiffs' argument is:

> Because plaintiffs have not alleged breach of contract claims or otherwise asserted claims that require construction [*23] of the agreements, their claims under the securities laws and RICO are outside the reach of either clause. Thus, none of plaintiffs' claims under the 1933 Act against the Members' Agents or Managing Agents arise from the Agents' violations of norms within the agreements.

Pl. Br. at 36. However, in shaping their argument plaintiffs have shifted from the language of the agreement itself, which calls for arbitration of disputes "relating to this Agreement," to a more

favorable description of disputes that "arise from the Agents' violations of norms within the agreements." The language actually employed in the Agreement in no way suggests that it covers only disputes concerning interpretation of the Agreements' literal terms. Rather, the coverage of all disputes "relating to" the Agreement most fairly can be read at least to include disputes concerning the formation or solicitation of the agreement, as well as concerning its requirements. Accordingly, plaintiffs' claims fall within the scope of the provision.

None of the cases cited by plaintiffs, all of which either involve narrower forum or arbitration provisions or claims that are less relevant to the underlying contract, are to [*24] the contrary. A number of these hold that defamation suits are not within the scope of arbitration clauses in commercial contracts entered into by the parties. *See. e.g., Popper v. Monroe,* 673 F. Supp. 1228, 1230-31 (S.D.N.Y. 1987) (clause requiring arbitration of "any dispute between the parties" does not cover defamation case with "no material relationship to the contractual relation with the parties"); *McMahon v. RMS Electronics Inc.,* 618 F. Supp. 189, 190-91 (S.D.N.Y. 1985) (arbitration clause governing "disputes and claims arising in connection with this Agreement" does not apply to defamation claims). Claims of defamation that did not bear on the formation or execution of the agreement containing the arbitration clause have much less to do with the agreement than does the present dispute, in which plaintiffs' claims result from the solicitation of plaintiffs by defendants to enter to contracts that contain the very arbitration and forum provisions in dispute.

Plaintiffs argue, as they did concerning the General Undertaking, that the English choice of law provision found in the Managing and Members' Agent Agreements establishes that [*25] the arbitration clauses do not cover securities fraud claims. This claim is rejected as to the Managing and Members' Agents Agreements for the same reason it was as to the General Undertaking.

Finally, plaintiffs argue that the language of the arbitration clauses contained in the Members' and Managing Agents Agreements is narrower than that in the General Undertaking or in earlier agreements, and that therefore Lloyd's must have intended to restrict the applicability of those terms. The pre-1990 Members' Agent Agreement, for example, required arbitration of "any dispute . . . which may arise between the Agent and the Name," whereas after 1990 the contracts only called for arbitration of disputes "relating to" the Agreements.

The new provision may be narrower than its predecessor, but is not as narrow as plaintiffs suggest. Before 1990 the contract purported to require any dispute whatsoever between the parties, whether or not even remotely related to Lloyd's or the agreements, to be arbitrated. After 1990, to be arbitrable a dispute at least had to be "related to" the agreement. However, as discussed above, "related to" is a term that reasonably embraces the present dispute and [*26] is not limited to defining the exact requirements of the contract that contains the term in question.

B. Public Policy Objections to Arbitration and Forum Selection Clauses

Plaintiffs argue that enforcement of the arbitration and forum selection clauses would undermine American securities law and would be contrary to public policy.

1. Arbitrability of Securities Fraud Claims

Plaintiffs first argue that the Supreme Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953), retains vitality and bars the application of predispute arbitration clauses to securities fraud complaints.

Wilko held that arbitration clauses entered into before a securities fraud dispute arose were unenforceable as contrary to public policy and were void under § 14 of the Securities Act of 1933, 15 U.S.C. § 77*a et seq.*, which voids any "condition, stipulation, or

provision binding any person acquiring any security to waive compliance" with the 1933 Act. 15 U.S.C. § 77n. *See Wilko*, 346 U.S. at 438.

However, *Wilko* has been flatly overruled. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-485 (1989) [*27] ("*Wilko* was incorrectly decided and is inconsistent with the prevailing construction of other federal statutes governing arbitration agreements in the setting of business transactions. . . . We overrule the decision in *Wilko*").

The facts as alleged here are controlled by *Scherk, supra.* The Supreme Court there enforced an arbitration clause in the face of a § 10(b)(5) claim where the arbitration clause was contained in "a truly international agreement." 417 U.S. at 515. As noted above, in *Scherk* the Supreme Court recited the benefits associated with such agreements, and the grave and numerous pitfalls that would be associated with a "parochial refusal by the courts of one country to enforce an international arbitration agreement." 417 U.S. at 516. Those observations apply here.

Plaintiffs attempt to portray the present transaction as not "international," and therefore as distinguishable from *Scherk.* In light of *Rodriguez,* which enforced an arbitration clause in a securities fraud case that apparently did not involve international commerce, this attempt appears irrelevant. Moreover, if anything, this case is closer [*28] to being entirely English than it is to being either international or a domestic American dispute. Plaintiffs went to England to become Members of a distinctively British entity, invested in syndicates operating out of London and entered numerous contracts all of which stated plainly that Lloyd's affairs and plaintiffs' investment would be administered in England and were subject exclusively to English law, English courts and English arbitration. Apparently all and certainly most defendants are British. The sole American elements are the nationality of the plaintiffs and their allegation that they were solicited in the United States. In light of the overwhelmingly British cast and subject matter, the location of some

negotiations in the United States and the American nationality of plaintiffs does not qualify the agreements as domestic securities contracts. *See The Bremen,* 407 U.S. at 2-4 (agreement international despite extensive negotiation within United States).

2. Applicability of the Convention to Lloyd's Arbitration Clauses

Plaintiffs next argue that the international arbitration Convention does not govern the arbitration clauses contained in the [*29] relevant Agreements. It may be that even if the Convention did not apply, the agreements nevertheless could remain binding under ordinary contract principles. In any event, none of the three rationales plaintiffs assert for the non-application of the Convention is persuasive.

First, plaintiffs maintain that "under § 202 of the [Federal Arbitration Act], which incorporates the Convention, the Convention does not apply to a domestic distribution of securities," Pl. Br. at 72, because the Convention applies only to contracts involving international commerce. *See David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 250 (2d Cir. 1991). In support of their position, plaintiffs cite numerous cases under the Convention that involve international sales and other simple transactions.

However, for the reasons recited above, the transactions in question here are international. It follows that the Convention applies.

Second, plaintiffs argue that this dispute is not "in respect of a defined legal relationship . . . concerning a subject matter capable of settlement by arbitration Convention Art. II.1, and therefore is not within the scope of the Convention. [*30] However, plaintiffs have not demonstrated that this dispute is not "capable of settlement by arbitration." Indeed, in *Rodriguez* the Supreme Court squarely addressed the arbitrability of securities fraud claims under both the 1933 and 1934 Acts, and held that such claims were arbitrable. *See Rodriguez,* 490 U.S. at 480-484.

Finally, plaintiffs argue broadly that any foreign arbitration award would be unenforceable as contrary to American public policy, and that therefore the arbitration clauses should not be enforced. In support, they cite only Justice Douglas' dissent in *Scherk,* which vehemently objected that "nothing justifies the conclusion that only a diluted version of [federal securities] laws protects American investors." 417 U.S. at 530-31. However, the conclusion Justice Douglas was criticizing, was in fact the holding of the case, a result that remains the law and binds the plaintiffs.

C. Exercise of Judicial Discretion Against Enforcing Arbitration and Forum Selection Clauses

Finally, plaintiffs argue that "as a matter of judicial discretion," the forum selection and arbitration agreements should not be enforced because [*31] their enforcement would deprive plaintiffs of the protections of securities laws, and would exculpate defendants from asserted securities fraud and RICO violations. Again, however, these precise arguments have been considered and rejected by the Tenth Circuit Court of Appeals in *Riley,* and are not supported by the weight of previous case law.

"The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair." *Riley,* slip op. at 10-11. In *Mitsubishi, supra,* the Supreme Court enforced a clause requiring arbitration of an antitrust claim in Japan "even assuming that a contrary result would be forthcoming in a domestic context," and rejected arguments that public policy demanded that American courts refuse to dilute American antitrust law by enforcing the agreements. *See Mitsubishi,* 473 U.S. at 629. Similarly, in *AVC Nederland B.V. v. Atrium Investment Partnership,* 740 F.2d 148, 158 (2d Cir. 1984) (Friendly, J.), the Court of Appeals [*32] for this Circuit enforced a forum selection clause specifying Dutch jurisdiction although it was unlikely that a Dutch court would enforce American

securities laws, which were the basis for the complaint. And in *Scherk,* the Supreme Court enforced an arbitration clause governing a securities fraud complaint where, as here, "in the absence of the arbitration provision considerable uncertainty existed . . . concerning the law applicable to the resolution" of the dispute, 417 U.S. at 516, and where, again as here, a motion to dismiss the complaint for failure to state a securities fraud claim was pending while the arbitration clause question was being decided. *Id.* at 516 n. 9.

Plaintiffs object that under the English causes of action available to them, they must show affirmative misrepresentations by defendants (as opposed to fraudulent omissions) and must make a more difficult showing of fraudulent intent. They also object that rather than the full panoply of American statutory provisions whose violation they have asserted, they will be relegated to mere common law claims and essentially identical statutory claims. They further question the [*33] availability of claims against various defendants.

Accepting only for purposes of discussion plaintiffs' description of English remedies that would be available to them, enforcement of the present arbitration and forum selection clauses nevertheless is far from "unreasonable or unjust," and is consistent with the standards governing enforcement of arbitration and forum selection agreements.

The sophistication and fairness of English courts cannot seriously be disputed, and has repeatedly been recognized by American courts, *see, e.g., The Bremen,* 407 U.S. at 12, while the arbitration proceeding has not been shown to be biased or incompetent, but has merely been objected to as unlikely to apply American securities laws.

Although English law does not afford the treble damage provisions of RICO or the less rigorous elements of proof of the American securities laws, it does at a minimum offer a full panoply of common law remedies for the alleged behavior underlying all plaintiffs' claims. These remedies include equitable claims for

rescission of fraudulently induced agreements and damages claims for negligent or fraudulent misrepresentation, or "deceit." Plaintiffs [*34] have conceded that these remedies are available as to the Managing and Members' Agents, who more directly interacted with plaintiffs than did other defendants, and, upon a stronger showing of scienter, as to Lloyd's. In addition, English securities regulations may be enforced against Lloyd's upon application by the government on behalf of a defrauded or misled purchaser of securities. Such remedies afford plaintiffs protection under the law; the English law which they earlier accepted merely is less advantageous than the American law that they now prefer. Under the circumstances, plaintiffs are not entitled to more.

It is undeniable that there exists a considerable American interest in affording investors the protections of our securities laws. However, that interest does not outweigh the strong American and transnational interest in maintaining the predictability and regularity of international commerce that is provided by agreements like those in question here, nor can it overcome plaintiffs' earlier agreement to be bound by English law and English dispute resolution.

* * * *

The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action [*35] on *forum non conveniens* grounds. In view of the dismissal pursuant to the arbitration and forum selection agreements, however, that question need not be reached.

Defendants' motions are granted. The complaint is dismissed.

It is so ordered.

DATED: New York, New York
August 18, 1992

Morris E. Lasker
U.S.D.J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT MANDATE

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of June, one thousand nine hundred and ninety-three.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JUNE 2, 1993
ELAINE B. GOLDSMITH - CLERK

PRESENT: HON. THOMAS. J. MESKILL, Chief Judge
HON. WILFRED FEINBERG,
HON. RALPH K. WINTER,
Circuit Judges.

JOHN S. ROBY; SUSAN B. BOLIN; AMANDA A. BRYAN; ANNE L. BRYAN; FLORENCE E. BRYAN; JOHN M. BRYAN; SUZANNE E. BRYAN; ROBERT S. CLARKE; PATRICK J. COLLINS; DANIEL F. COUGHLIN; ROBERT L. COX; JOHN D. DIVER; ALBERT W. DUGAN; LEE R. ELLENBURG; JULES I. EPSTEIN; TILLMAN R. FESPERMAN; MARTHA H. FOGELMAN; ROBERT F. FOGELMAN; ROBERT S. FORMAN; LEONARD FRIEDMAN; MARVIN GOODSON; ANDREW GROSSMAN; KATHRYN B. HAMPTON; ALTON B. HARRIS; MICHAEL C. HARTLEY; CAROL M. HATHAWAY; JEROME E. HICKEY; ALAN J. HUNKEN; DALE A. JENKINS; ROBERT B. KING; RICHARD J. KISSEL; RAYMOND C. LEE; JANIS L. MacMILLAM; J. STEVEN MARKS; MARY L. MARKS; JAMES L. McCORMICK; NORMAN N. MINTZ; CHARLES E. MORRIS; ALVIN B.

92-9032

MOSS; WILLIAM B. MURRAY; MARGARET W. NICHOL; ROSEMARY H. PASEK; JOSEPH N. PATTISON; CHARLES F. ROBINSON; JOHN N. ROBINSON; JOE R. ROBY; HERBERT A. RUBIN; JACOB A. RUBIN; ROBERT W. RUDER; CONSTANTINE SALONITIS; ARTHUR SCHECHNER; CHARLES SCHNAID; LOUIS B. SCHOEN; K. DINO SIRAKIDES; JOEL M. SPIRO; GILCHRIST B. STOCKTON, JR.; WILLIAM N. STOUT; KENNETH M. TAYLOR; MARVEL WILSON, JR.; HENRI L. WEDELL; CHARLES I. WELLBORN; WILLIAM T. ZANONI; ROGER ANDERSON; CHARLES G. BENTZIN; PETER A. BENZ; THORTON COOKE; DONALD D. DECENSO; MARCO DiLAURENTI; LYDIA P. DUGAN; ROBERT E. EAKIN; KAROLE E. GLASER; OLIVER R. GRACE, SR.; JACK D. GRAY; A. CARY HARRISON, III; SIDNEY KAHN; AUDREY W. KATZ; ROBERT P. KEITH; ALAN W. KRAL; JAMES E. KRAUSE; NANCY KURZ; PAUL W. McMULLAN; HENRY A. MITCHELL, JR.; KATHERINE S. NORDHAUS; CHARLES W. OLSON; JAMES J. O'SULLIVAN, JR.; LIBBY B. POHORYLES; ANTHONY B. SOSKIN; HERMAN G. STURMAN; ALYSON WARNER; EARL D. WHITTEMORE; HERBERT N. ZACK; JOHN H. ABELES; ALBERT B. CRUTCHER, JR.; JAMES S. DEELY; STEPHEN E. DELASZLO; DAVID DOLGENOS; LINDA TUFTS HEBBLER; ROGER W. HOUSE; CHARLES A. JANDA; JEANNE LONG; CHARLES A. MALKEMUS; ANDREW H. MARKS; ALLISON MERCER; MARTHA LONG NAVARRO; GREGORY J. SALKO;

ISSUED AS MANDATE
6-28-93

APPENDIX G

APPENDIX C

District Court Opinion in *Leslie v. Lloyd's,*

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES ROBERT LESLIE	§	
	§	
Plaintiff,	§	
	§	
VS.	§	C.A. NO. H-90-1907
	§	
LLOYD'S OF LONDON, a/k/a	§	
LLOYD'S, a/k/a THE	§	
CORPORATION OF LLOYD'S,	§	
a/k/a THE COMMITTEE OF	§	
LLOYD'S, a/k/a THE	§	
SOCIETY OF LLOYD'S and	§	
R.W. STURGE & CO., a/k/a	§	
R.W. STURGE LTD.,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

This 4th day of September, 1991, the defendants' objections filed by Lloyd's of London and R.W. Sturge, came on for ruling by the Court. The Court has reviewed Magistrate Stacy's rulings on the pending Motion to Dismiss. After a thorough review of the motions responses of Lloyd's and R.W. Sturge and the rulings of the magistrate, this Court finds that the Magistrate's ruling is appropriate and should be affirmed.

STANDARD OF REVIEW

The matters to which the Defendant has objected were referred to Magistrate Frances H. Stacy pursuant to the Magistrate's Act contained in Title 28 § 631, *et seq*. Specific authority for this type of referral is granted by Title 28 §636(b)(1)(A). Rule 82 of the Fed.R.Civ.P. as amended in 1983 governs the conduct of review of objections to Magistrate's Rulings. Federal Rules of Civil Procedure 72(a) requires the Court to "modify or set aside any portion of the Magistrate's Order found to be *clearly erroneous or contrary to law*." The rule and the Magistrate's Act clearly contemplate the District Court granting great deference to the Magistrate's actions as long as the Magistrate's decision is not "clearly erroneous or contrary to law." Although the Act provides for a de novo review by the District Judge, the threshold requirement on any party raising objections to a Magistrate's rulings is to point out specifically where the Magistrate's decision is either clearly erroneous on the facts or contrary to law on the basis of existing case law. This Court is firmly committed to the concept that:

> "Defendants bear a heavy burden. The court may reconsider discovery matters referred to a Magistrate pursuant to Sections 636(b)(1)(A) of Title 28, if the Magistrate's rulings are 'clearly erroneous or contrary to law.' Moreover, in resolving discovery disputes, the Magistrate is afforded broad discretion, which will be overruled only if abused."

City Corp. v. InterBank Card Association, 478 F.Supp. 756, 765 (S.D.N.Y. 1979).

ANALYSIS

The defendant filed nineteen objections focusing on the alleged representations by Sturge in the United States as to their relationship with Lloyds and the workings of the insurance syndication's process in England. Sturge's alleged representations in the United States were sufficient to constitute a violation of

Security and Exchange Rule 10(b)(5). The federal courts have nearly unanimously held that 10(b)(5) violations occurring in the United States are sufficient basis for federal court jurisdiction.

Furthermore, Sturge's alleged representations when combined with Lloyds' conduct which could be construed as affirming or adopting Sturge's apparent agency relationship with Lloyd's, raise the possibility of the imposition on Lloyd's of liability for Sturge's conduct. The Magistrates recommendation of denial of the motion to dismiss is appropriate.

This Court therefore finds that the Magistrates recommendations are well founded in State and Federal law, and the Magistrate's ruling should be and hereby is AFFIRMED.

The clerk shall enter this order and furnish a copy to all parties.

Signed this 4th day of September, 1991 at Houston, Texas.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX H

Lloydy Luck, PRIVATE EYE, July 2, 1993 at 28

It is now just over a year since the prime minister's historic visit to the United States in which he accomplished a most desperate mission: to save Lloyd's of London from the prying eyes of US government investigators.

During his visit -- in the first week of June last year -- John Major beseeched President Bush to stop the burgeoning investigations by US government agencies into Lloyd's. For nearly a year the securities exchange commission (SEC) had been investigating Lloyd's manic recruitment of investors in the US during the boom years of the 1980s.

Lloyd's was protected during the recruitment by its long-standing exemption from strict US laws governing the issue of securities. Was the exemption legal, especially for the recruitment of "unsophisticated" investors (ie investors who have at their disposal less than $1 million? And if the exemption was not legal, what was to stop hundreds of American "names" recruited to Lloyd's syndicates which have now been stung by massive claims over asbestosis and pollution from suing Lloyd's for the reimbursement of their losses?

These were the questions being asked by the grim-faced men from the SEC, and others even grimmer. In October 1991 reports leaked out that the Federal Bureau of Investigation was "widening the net to examine the possibility that the American names were the victims of fraud when they were signed up by Lloyd's agents" (The Times, 3 October 1991). The senate investigations sub-committee was digging even deeper.

Nothing could have done more damage to Lloyd's than a mass of lawsuits following such investigations. The recruitment without strings, with immunity from prosecution and unlimited liability, of thousands of rich Americans had been crucial to Lloyd's development and survival. But as many of those new investors

faced ruin, Lloyd's chiefs observed with horror that prominent US politicians were clamoring for results from the SEC Investigations.

As early as December 1991, for instance, Senator John Dingell, chairman of the House energy and commerce committee, wrote to the head of the SEC, Richard Breeden, demanding answers to questions about the progress of the inquiry. By the time Major got to Washington, there was something approaching panic in the high Tory circles at the top of Lloyd's.

Carefully briefed about all these matters, Major argued with Bush that British law (which has already decided that the Council of Lloyd's owes no duty of care to its Investors) should prevail in all such cases, and that American law should not be invoked. Bush agreed at once. Almost without anyone noticing, the investigations were summarily stopped.

Major had struck a great blow for his party. No one knows better than he how much his government and his majority depends on Lloyds' staying in business, safe behind its pervasive legal immunities.

The pending penury of so many Tory MPs who are "names" at Lloyd's is constantly being mourned in the newspapers, but it is only fair to remember that not all of them have suffered. Some have shown great shrewdness in extricating themselves from unlucky syndicates in the nick of time.

The record of Roger Knapman, farmer/surveyor MP for Stroud, is outstanding. In 1986, the year before he entered parliament, he came off the notorious Fagan syndicate (540) which declared some $600 million losses in the following four years. In 1987, Mr. Knapman came off the Gooda Walker syndicates (298 and 164), and Hazel (190), both of which declared huge losses the following year.

APPENDIX I

APPENDIX I

Cheryl B. Strauss, *Do US Investors Need More Foreign Listings?*, INVESTMENT DEALERS' DIGEST, Nov. 9, 1992

November 9, 1992

SECTION: EXCHANGES; Pg. 16

LENGTH: 3138 words

HEADLINE: Do US investors need more foreign listings? The SEC says it won't fix what is already working, but the NYSE says it's not working well enough

BYLINE: By Cheryl Beth Strauss

BODY:

AS A BUDDING INVESTOR, Manish Chopra has more reason than most to consider international equities. Born in New Delhi, India, Chopra is an investment banking analyst at a Wall Street firm. Although he has poured some $10,000 into US stocks since January, he says he is wary of "completely depending on the performance of any one economy." Even his broker has urged him to invest in a multi-market fund consisting of a basket of foreign stocks.

But Chopra has decided to pass on foreign equities -- at least for the moment. One immediate reason: September's currency mess in Europe. On another level, though, Chopra is typical of many US retail investors who show an initial interest in "investing in the international market as some point," as Chopra says, but never quite reaching that point. The market seems too unfamiliar, too scary and too, well, foreign.

William Donaldson wants to end that collective hesitation. The chairman of the New York Stock Exchange wants to make it

easier for Chopra and other investors to add an international equity or two to a portfolio. Donaldson has put considerable muscle behind a drive to get more foreign listings on the Big Board. Indeed, Donaldson is forthright in saying "we want to consolidate our position as a global power and see foreign companies list here."

Do US investors want, or need, more foreign equities? The question is a good one, and the answer is surprisingly complex. Exchanges says that investors are clamoring for foreign stocks. They cite statistics compiled by the Securities Industry Association showing that US investors have increased their holdings of foreign stocks to roughly $150 billion currently, a 62% rise from 1990's $92 billion. By comparison, their holdings of US stocks increased only 25% during the same period.

Exchanges also cite the large "pink sheet," or off-exchange market, the exists in American Depository Receipts, the vehicle by which most foreign firms now trade in the US. Of 890 ADR programs in the US, only 195 are listed on an exchange, according to Joseph Velli, an ADR expert with the Bank of New York. The rest, he says, are traded on the pink-sheet market. The Big Board, naturally enough, wants to formalize that off-exchange market, and give it more transparency.

But there is a flip side to the NYSE argument. Institutional investors, who buy most of the foreign shares, already have significant access to international equities. Retail investors like Chopra may be vaguely interested, but that is far short of hard demand. Many observers see the new push as a direct result on the NYSE -- like virtually all exchanges -- casting about for new revenue streams.

Sara Hanks, former chief of the international corporate finance office at the Securities and Exchange Commission, says that the NYSE is acting out of "enlightened self interest," wanting to boost its bottom line. That bottom line is quite healthy -- thank you -- at the moment, but the Big Board does have reason to be concerned about future revenue resources.

Its specialist system -- even its trading floor -- have been criticized as dinosaurs in an age increasingly dominated by computerized trading. The NYSE cleanly missed perhaps the most important movement on Wall Street in recent years -- derivatives. Its customers, too, have displayed an increasing willingness to trade away from the exchange. The NYSE's share of consolidated tape volume has dropped from roughly 87% to 82%. In that same period, the share of the NYSE's biggest competitor, the National Association of Securities Dealers Automated Quotations (Nasdaq), climbed to 6% from 2%.

Nowhere, though, is the clash over foreign listings louder than in the collision between the world's biggest stock exchange and its equally powerful regulator, the SEC. On the surface, the issue is about disclosure. In their home markets, foreign firms issue far less information -- with far less frequency -- on their operations than do their US counterparts. The Big Board wants the SEC to relax those rigid standards to allow "world class companies" like Germany's Daimler-Benz and the UK's Rolls Royce, to be able to list on a US exchange without having to overhaul their accounting procedures.

On a deeper level, though, the struggle may be about something more fundamental. If the SEC allows even a few exceptions to reporting standards, some believe, then its whole mandate may be open to question. Some observers say it is not the SEC's role to attract business for the exchanges -- no matter how much they may come to need it -- and that the SEC should stick purely to matters regulatory.

"How can the SEC give in and taint themselves," asks Merton Miller, a Nobel Prize winner and professor of economies at the University of Chicago, "anymore than the Windsor family of England could let King Edward the VIII marry a commoner, especially one who is also a divorced woman and an American?"

Both Donaldson and SEC chairman Richard Breeden deny that a clash exists. "There is no impasse," declares Breeden. "In the past few years, we have had more foreign issues registered here

than on any other planet." While the number of foreign issuers on the London Stock Exchange has decreased by 10 over the past three years, Breeden says, that the US marketplace has increased by 139. He concludes: "We don't care to exchange a system that has been overwhelmingly successful."

But change is exactly what Donaldson wants. While the NYSE chairman denies any sort of rift between the NYSE and the SEC, in the next breath he says that US investors are "missing out on some 2,500 foreign companies that would qualify to list on the NYSE that are 20 times the size of the average prospect here."

And the NYSE point of view is not without its supporters. Jonathan Auerbach, head of JI, Auerbach & Company, a broker/dealer firm specializing in international securities, contends: "The SEC is making prohibitive regulatory requirements, and our capital is being exported."

Which side will win? This issue, like so many on Wall Street, will be hugely affected by President-elect Clinton's victory, and the more than 100 new faces that will comprise the 103rd Congress. A new Administration will quite likely mean a new head of the SEC. But regardless of politics, many believe it's only a matter of time anyway before the SEC is forced to alter its stance.

"The American government will not sit forever and bar the NYSE from bringing foreign securities to the Big Board," says Edward Fleischman, a SEC commissioner who resigned in March of this year and is now an attorney with Rosenman & Colin. Fleischman, who had more than his share of run-ins with Breeden in his SEC days, says he told an NYSE lobbyist in Washington that the "majority of [SEC] commissioners are with you, but the chairman is against you." Donaldson, he notes, will still be there when Breeden is gone.

While Donaldson, Auerbach and others on Wall Street couch the issue in terms of US competitiveness, the institutions -- which comprise two-thirds of the daily trading volume on the

NYSE -- really aren't having a problem competing. Institutions already have far better access to foreign stocks than US retail investors.

For starters, institutions obviously have ample funds to invest abroad directly with a foreign broker, and to maintain a foreign account. Second, they have access to research on foreign firms both from Wall Street houses and their own internal research operations. And third, within the US, institutions are privy to a bifurcated private placement market that excludes retail investors, namely Rule 144A.

Developed by the SEC, 144A came to Wall Street with much fanfare. It has done well in debt markets, and fizzled in equity markets. Introduced in April 1990, 144A recognized that sophisticated investors should be able to buy and sell unregistered securities. Most foreign stocks are not registered with the SEC.

The rule has clearly and completely failed to develop a secondary market for unregistered foreign equities. Instead, 144A equities have become a phone-traded market in the US, but frequently with vibrant markets in the underlying stock in the country of origin. "The securities are being sold back to their home market," says Hanks, the former SEC international corporate finance official.

There are compelling arguments for buying a security in its home market. By opting for an original security over an ADR or 144A security, an institution can bypass the 15% withholding tax on foreign dividends. Also, institutions wanting to match fund liabilities may prefer to keep their foreign holdings in the home currency. Thus, even with increased foreign security access to US exchanges, there is no guarantee that a greater percentage of institutional activity would be conducted in dollars on the NYSE.

Think pink

Many Wall Street pros lament that the greatest marketplace for foreign securities in the US is also the least regulated: the

so-called "pink sheet" market. Only 22% of the 890 ADR programs for foreign securities in the US are exchange-traded, and the rest are pink-sheeters, according to the Bank of New York's Velli.

NASDAQ even has an over-the-counter bulletin board that is, in effect, an automated pink-sheet market. "Everybody buys on this market," Velli says. "It is both retail and institutional."

Since ADR prices are determined by the conversion price multiplied by the price of the actual share in the home market, there is not much variation between the price of an ADR on the pink-sheet market and on an exchange.

"It is important to recognize the size of the unregistered ADR market," says David Domijan, an executive vp in charge of new listings at the NYSE. "Over $1.6 billion worth of ADRs in the US are not listed with SEC, don't provide GAAP [Generally Accepted Accounting Principles] finances, and are traded in a less transparent, unregulated market. These companies are forced to go through intermediaries or pink sheets. It is a detriment to the US investor."

"GAAP is holding us up," adds Donaldson, the NYSE chairman. The result, he claims, is that the "American investor is buying the stock anyway in markets that have wider spreads and that cost 8% to 10% more."

As it turns out though, the pink sheet ADR market serves a couple of very useful purposes. Some foreign companies may be reluctant to register in the US without testing demand for their securities. "[They] use the pink sheet market as a stepping-stone market," says Velli.

These foreign companies go through only the rudimentary level one ADR disclosure procedures to trade in the pink-sheet market. Typically, after any anywhere between six months and five years, level-one ADR firms move up the ladder to level two, and list on an exchange.

Over the last three to five years, some 10% to 60% of level two-listed ADRs started off as level-one pink sheeters, according to Bank of New York statistics. Some of the better-known firms that have made that trip in the past two years include: Elf Aquitaine of the UK, now listed on the NYSE; Wellcome PLC, also from the UK and now listed on the NYSE; Microfocus, a British computer software company listed on NASDAQ; and Medeva, a UK pharmaceutical company listed on the American Stock Exchange.

Even today, some of the most active ADRs in the US still reside on pink-sheet rolls, names like Volkswagen AG of Germany and Rolls Royce of the UK.

The institutional edge

Besides the pink-sheet ADR market, retail investors have considerably fewer choices than institutions when it comes to international equities. Retail investors aren't privy to most Wall Street research. They generally can't afford a separate foreign broker or account. The currency issue is a hassle. So, too, is the relative lack of disclosure for foreign firms compared to the US.

That leaves, for most retail investors, a country fund or a listed ADR as the only other options. In a country fund, a manager purchases a basket of stocks originating in a particular country. The investor is generally stuck with using an intermediary, or broker, because of the lack of information about foreign companies' financials.

Done correctly, this can help both the investor and the broker. "Retail brokers," says Junius Peake, chairman of The Peake/Ryerson Consulting Group and a former member of the board of governors at the NASD, "would get nailed with unsuitability charges if they recommended some obscure foreign stock to their investors, because they wouldn't be able to defend themselves with consistent information about the companies that they're selling you."

Finally, there are the level-two ADRs -- foreign stocks that are actually traded on a US exchange. "ADRs are popular," says Smith Barney, Harris Upham & Co. broker Mark Freeman. "Clients don't necessarily want to invest in country funds because they don't want to pull all their eggs into one basket." The downside, though, of exchange-traded ADRs, "is the 15 percent withholding tax on foreign dividend," Freeman notes.

Although Freeman has seen client interest grow -- especially in Mexican stocks -- over the past three years, less than 10% of his 200-plus clients have actually chosen to invest in foreign stocks. Those clients who invested in Mexico though, have "seen staggering returns, multiples upon multiples on their money," he says.

Even the 10% figure, though, may overstate the degree of interest. Walter Haddad, a PaineWebber Chairman's Council broker -- a producer who is in top 1% of the company in terms of bringing in gross commissions greater than $ 1 million -- states flatly that he has seen no interest in foreign stocks from his clients. "They don't ask me, and I rarely bring the topic to them," he says.

The disclosure issue

Clearly the biggest hurdle to increased foreign listings on US exchanges is that of disclosure. Every country requires a firm headquartered within its borders to disclose a certain amount of information about its finances. The US, as SEC chairman Breeden never tires of pointing out, has the highest standards -- "100% disclosure," he says. As for other countries, Germany clearly has the most contentious accounting standards.

Germany has long followed the use of "hidden asset reserves" to smooth out financial bumps, according to Nick Platt, a managing director of investment banking and international marketing at the American Stock Exchange. German companies don't have to disclose their cash reserves; they often use this money to bolster their net income and smooth out earnings bumps. This practice can turn losses into gains, making a true financial

snapshot of a firm's condition at any given time a matter of guesswork, at least to a degree.

"[German] companies will never be listed on a major exchange as long as I live," Platt says. He doesn't see American disclosure standards relaxing to accommodate German firms anytime soon, or vice versa. "I don't think that the SEC will loosen up the listing standards to trade outside US GAAP requirements. It would look like it wasn't doing its job," he concludes.

While Platt's view has a significant following, so does that of Bill Donaldson. "We must," says the NYSE chairman, "reach agreement to let foreign companies come in with less than total conformity. What we are saying is that other fully developed countries' systems of ideas and sense of conservatism should be recast into American terms."

As for the German reserve issue, "the Germans have better flexibility for their companies to smooth out aberrations in their financials," Donaldson contends. Our own system of reserving, he correctly notes, is far from perfect. It is not uncommon for a US company, after years of less than adequate reserving, to "end up with a one-shot writedown," he says. "They how does the American investor understand what that action means about a US company?"

Mano a mano

The issue may be one of US competitiveness, as Bill Donaldson would have you believe, but it also is a showdown between two of the more important men on the US financial landscape. Ego and issue are, to some extent, intertwined.

Donaldson, as many point out, will still be at the helm of the NYSE despite the change in the White House. Breeden, on the other hand, has more limited choices. Clinton will probably choose a new SEC Commissioner more in line with his politics. But despite President Bush's loss, Breeden still needs to be

perceived as successful and vigorous to help him find work in the private sector once the new administration is firmly ensconced.

US investors take licks

In reality, the SEC stamp of approval means little more than a guarantee that a reasonable amount of information will be provided. US investors can and do get sucker-punched even with strong US disclosure laws.

Just last month, Chambers Development Co., according to published reports, had to restate earnings for every year since its founding in 1985; rather than big profits as reported, the Amex-traded waste management firm actually lost money each year. An overzealous management reportedly became obsessed with reporting profits no matter what the true results. American disclosure laws did not help Chambers' investors.

Chambers Development did not occur in a vacuum; the same story has recurred countless times on US exchanges, as it has on foreign exchanges. Yet foreign investors don't seem overly concerned about disclosure levels. "The German experience," says Nobel Prize-winning economist Miller, "suggests that people are willing to take their chances."

A hint of compromise?

One possible solution might be for the SEC to allow a completely bifurcated market -- which many people argue is actually the current state of affairs now because of the power that institutions command.

In such a marketplace, institutions would be able to buy and sell all foreign securities, knowing that the SEC has not cleared these companies but recognizing, as in 144A, that institutions are sophisticated buyers.

Shearson Lehman Brothers' head of international equities, Frank Masi, thinks such a solution makes sense. "There is more

and more institutional investment being made abroad," he says. "Whoever is there for foreign listings, NYSE or NASDAQ, can be a world marketplace."

The other possible solution -- which would include both retail and institutional investors -- is for US exchanges to list foreign securities with an asterisk next to them saying that they have not fulfilled all of the SEC's disclosure laws. But, again, the retail investor would end up being the party most at risk, and the retail investor is precisely the one that the SEC was created to protect.

GRAPHIC: Picture 1, Nobel Prize winner Miller: 'How can the SEC give in and taint themselves anymore than the Windsor family . . . could let King Edward the VIII marry a commoner?'; Graph, U.S. net purchases of foreign equities, Source: Securities Industry Association; Picture 2, SEC's Breeden: 'We don't care to change a system that has been overwhelmingly successful.'; Picture 3, NYSE's Donaldson: US investors are 'missing out on some 2,500 foreign companies that would qualify to list on the NYSE.'

APPENDIX J

Floyd Norris, *Daimler-Benz is Ready to Sign Up With Wall Street*, THE NEW YORK TIMES, March 25, 1993

March 25, 1993, Thursday, Late Edition - Final

SECTION: Section D; Page 1; Column 3; Financial Desk

LENGTH: 682 words

HEADLINE: Daimler-Benz Is Ready to Sign Up With Wall St.

BYLINE: By FLOYD NORRIS

BODY:

Daimler-Benz A.G., the maker of Mercedes-Benz automobiles and the largest industrial company in Germany, said yesterday that it expected to become the first German company to trade on the New York Stock Exchange.

The listing would cap a bitter battle that has pitted the exchange and its chairman, William H. Donaldson, against the Securities and Exchange Commission and its chairman, Richard C. Breeden.

The big board has argued that the American accounting standards now required should be waived in order to persuade foreign companies to list their shares in the United States. While many companies have done so and trading has increased significantly, others, including German concerns, have resisted the expense -- and perhaps the embarrassment -- of restating their figures.

Setting a Big Example

No details of the tentative agreement between Daimler and the S.E.C. were released, but one person familiar with the details of the negotiations said the German company would release most of the information required under the American accounting rules.

If so, it would be a victory for Mr. Breeden in his final weeks at the S.E.C. He has already announced his resignation, though President Clinton has not named a replacement. Now, supporters of Mr. Breeden can argue that if a big company like Daimler-Benz is willing to comply with the basic American requirements, other German companies will not find it too burdensome.

American accounting rules require more disclosures than most foreign accounting rules, particularly in areas like reserves and dealings with related companies. To sell securities in the public markets in the United States, companies -- both domestic and foreign -- are required to file accounts that are substantially in conformity with the rules known as the Generally Accepted Accounting Principles.

In a statement released yesterday in Stuttgart, Germany, Daimler said that as a result of changing some accounting policies, it will report "an extraordinary profit of more than 4 billion marks," or about $2.45 billion, Reuters reported.

That seemed to indicate that the company was going to disclose a variety of reserves, as required under the American rules.

German accounting policies allow companies to set up secret reserves, into which money can be put in good years, lowering reported profits, and removed in bad years, increasing reported profits. Mr. Breeden has argued that such reserves allow companies to manipulate profits, preventing shareholders from knowing the real trends in the business.

Mr. Breeden, in an interview, declined to discuss terms of the tentative agreement, but said the Daimler announcement was correct. It said Mr. Breeden and Gerhard Liener, Daimler's chief financial officer, will meet in New York early next week to complete the agreement.

Mr. Donaldson has made efforts to list foreign companies a top priority since he took over the helm of the New York Stock Exchange. He has argued that it is becoming easier for American investors to buy shares of foreign companies in overseas markets and that refusing to allow "world class companies" to list in New York risked diminishing New York as a world financial center.

'We Are Delighted'

In a statement yesterday, Mr. Donaldson said, "We are delighted that the company announced today that it is now in a position, based on negotiations with U.S. regulators, to become the first German company to list."

A few years ago the S.E.C. spoke with a group of German companies about the possibility of listing in the United States, but the talks failed to produce an agreement. It appears that the talks with Daimler heated up earlier this year.

Until details are known, it will not be possible to determine just how far the S.E.C. went to accommodate Daimler. One area where compromises may have been made is in presenting three years of historical information for acquired companies. Such information is often difficult to determine, and there have been cases in which the S.E.C. allowed companies to make only partial disclosures in that area.

GRAPHIC: Graph: "The Attraction Of Foreign Stocks" shows purchases of foreign stocks by Americans on U.S. equity markets from '82 to '92 (Source: Treasury Department)

SUBJECT: STOCKS (CORPORATE); MULTINATIONAL COMPANIES; STANDARDS AND STANDARDIZATION;

ACCOUNTING AND ACCOUNTANTS; DISCLOSURE OF INFORMATION

ORGANIZATION: DAIMLER-BENZ AG; SECURITIES AND EXCHANGE COMMISSION (SEC); NEW YORK STOCK EXCHANGE (NYSE)

NAME: NORRIS, FLOYD

CO: DAIMLER-BENZ AG; NEW YORK STOCK EXCHANGE;

APPENDIX K

Hal Lux, *SEC Commissioner Proposes Foreign Listing Mechanism*, INVESTMENT DEALERS DIGEST, May 29, 1993

May 24, 1993

SECTION: FIRMS & EXCHANGES; Pg. 12

LENGTH: 646 words

HEADLINE: SEC commissioner proposes foreign listing mechanism; NYSE could get a rehearing under new regime

BYLINE: Hal Lux

BODY:

Richard Roberts, a commissioner at the Securities and Exchange Commission, is recommending that the agency explore a new US exchange-listing mechanism for foreign stocks that would fall somewhere between a regular exchange listing and the Rule 144A private placement category.

While Roberts has not said how the agency might craft these new regulations, his proposal is a sign that the SEC may soon reconsider a New York Stock Exchange request to exempt foreign companies looking to list in the US from some SEC disclosure requirements.

Roberts' proposal comes as Arthur Levitt, Jr. prepares to take over as SEC chairman. Richard Breeden, the outgoing SEC chairman who publicly clashed with NYSE chairman William Donaldson on the foreign listings issue, left the SEC last week. Breeden was well known for controlling the agenda of the commission during his tenure, and some insiders have long claimed

that the Big Board would find support for its proposal within the agency if it could ever get the plan on the table.

"While the progress toward making the US capital market the international securities trading center has been significant, a legitimate argument can be made that some mechanism between 144A and a regular US listing would enable a foreign issuer to wade deeper into the US capital formation system and would foster even greater such progress," said Roberts in a recent speech at the National Regulatory Services Supervision/Compliance Conference.

The commissioner said the agency faced many hurdles in trying to fashion a rule that would attract foreign issuers to the new mechanism while not discouraging them from seeking regular listings. He also voiced concerns about disadvantaging domestic issuers in the US markets who would not be able to list under the relaxed rules.

Sara Hanks, who developed Rule 144A for the agency as head of international corporate finance, said the mechanism would make it more difficult to sell foreign companies on full-blown listings. "I think we have to assume that most foreign issuers would go for that category instead of regular listings."

"Such a mechanism, accomplishing all of these goals, may be unachievable," said Roberts. "My concern to date has been the reluctance of the commission to explore developing such a mechanism. Possibly there will be more of a willingness to do so in the future."

Debate not over

There has been speculation that the Big Board's recent success in getting a regular stock listing from Daimler-Benz might doom its campaign to win concessions from the SEC. Roberts said the Daimler-Benz listing, which may be followed by "a handful of Swiss and German issuers," should not discourage SEC experimentation with new mechanisms.

"While I believe the progress made with Daimler-Benz is a significant achievement," Roberts added. "I am not so sure that it ends the debate over whether there should be some intermediate listing standard between 144A private placements and regular US listings standards."

The commissioner warned that with the "upcoming management change" at the agency, predicting the future is not easy. Levitt, who is now preparing for his Senate confirmation hearings, has not said what his priorities as chairman will be.

However, as former head of the American Stock Exchange, Levitt does have a track record on the issue. He pushed for increased foreign listings while chairman of the Amex. In addition to pursuing individual stock listings, the Amex under Levitt launched derivative products based on proprietary international stock index as well as country indices.

His efforts included some requests for disclosure relief from the SEC. While those differed from the NYSE proposal on foreign listings, a source familiar with Levitt's work at the Amex speculated that Levitt may be inclined to loosen some disclosure requirements.

No. 93-333

Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

v.

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TAYLOR R. BRIGGS
Counsel of Record
SHEILA H. MARSHALL
MARY L.B. BETTS
STEPHEN H. OREL
LEBOEUF, LAMB, LEIBY & MACRAE
125 West 55th Street
New York, New York 10019
(212) 424-8000
*Counsel for Respondents The Society, Corporation, Committee and Council of Lloyd's and their Individual Internal Members**

THOMAS W. WILSON
JONATHAN C. THAU
NICHOLAS J. CONCA
FRED N. KNOPF
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
150 East 42nd Street
New York, New York 10017
(212) 490-3000
*Counsel for the Members' Agent Respondents**

DANIEL M. BIANCA
LEO W. FRASER, III
WILLIAM A. MEEHAN
MENDES & MOUNT
750 Seventh Avenue
New York, New York 10019
(212) 261-8000
*Counsel for the Managing Agent Respondents**

*(Complete Lists of These Respondents Appear in Appendix B to the *Petition for Certiorari*)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

COUNTER QUESTION PRESENTED

Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioners' purported federal securities law claims against the Society, Corporation, Committee and Council of Lloyd's of London and against their Managing Agents and Members' Agents at Lloyd's, arising out of Petitioners' membership in that very English institution.

STATEMENT PURSUANT TO RULE 29.1

Respondents the Society, Corporation, Committee and Council of Lloyd's, have no parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States. Those Managing Agent Respondents that have parent or subsidiary corporations within the meaning of Rule 29.1 are listed below:

Managing Agent	Parent Companies and Subsidiaries
Anton Managing Agency	Merrett Holdings Plc.
AJ Archer & Co., Ltd.	AJ Archer Holdings Plc.
Birrell Smith Underwriting Agency	Cater Allen Holdings Plc.
BPC Underwriting Agencies	BPC Holdings Ltd.
Cater Allen Synd. Mgmt.	Cater Allen Holdings Plc.
Edwards & Payne Underwriting Agency	Sturge Holdings Plc.
Guest Barnes (Uwring. Agencies)	Cater Allen Holdings Plc.
Holmes Hayday Underwriting Agencies Ltd.	Sturge Holdings Plc.
BPD Kellett & Company Ltd.	AJ Archer Holdings Plc.

STATEMENT PURSUANT TO RULE 29.1 – Continued

London Wall Managing Agency Ltd.	London Wall Holdings Plc.
Mark Loveday Uwring. Agencies	Cater Allen Holdings Plc.
MIS Uwring. Agency Ltd.	Merrett Holdings Plc.
Merrett Syndicates Ltd.	Merrett Holdings Plc.
Murray Lawrence & Partners Ltd.	Murray Lawrence Holdings Ltd.
Oxford Syndicate Mangement Ltd.	Sturge Holdings Plc.
RD Robertson Uwring. Agency	Cater Allen Holdings Plc.
Stewart & Hughman Ltd.	Stewart Underwriting Agency
Sturge Marine Syndicate Mgmt. Ltd.	Sturge Holdings Plc.
Three Quays Uwring. Mgmt. Ltd.	Cater Allen Holdings Plc.

Managing Agent Respondents not appearing in the table above have no parent or subsidiary corporations within the meaning of Rule 29.1.

Those Members' Agent Respondents that have parent or subsidiary corporations within the meaning of Rule 29.1 are listed below:

STATEMENT PURSUANT TO RULE 29.1 – Continued

Members' Agent	Parent Companies and Subsidiaries
Alexander Howden & Beck Ltd.	London Wall Holdings PLC
Cater Allen Members Agency	Cater Allen Holdings PLC
Donner Underwriting Agencies Ltd.	Sturge Holdings PLC
Gardner Mountain & Capel –	Hogg Group PLC
London Wall Members' Agency Ltd.	London Wall Holdings PLC
PW Kininmonth Ltd.	A.J. Archer PLC
RW Sturge Ltd.	Sturge Holdings PLC
Sedgwick Lloyd's Underwriting Agents Ltd.	Sedgwick Group PLC
KC Webb (Underwriting) Ltd.	Hogg Group PLC
Willis Faber & Dumas (Agencies) Ltd.	Willis Corron Group PLC

Members' Agent Respondents not appearing in the table above have no parent or subsidiary corporations within the meaning of Rule 29.1.

TABLE OF CONTENTS

Page

COUNTER QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.1..... ii

TABLE OF AUTHORITIES vi

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION..... 7

I. The Decision Below Follows the Decisions of this Court and of all Courts of Appeals that have Considered Identical Cases 7

II. The Decision Below Raises no New Issue..... 14

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bonny v. The Society of Lloyd's, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993) 3, 7, 21

Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) 10, 14, 21

Development Bank of Philippines v. Chemtex Fibres, Inc., 617 F. Supp. 55 (S.D.N.Y. 1985) 14

Hafer v. Melo, ___ U.S. ___, 112 S. Ct. 358 (1991) 1

Heller v. Doe, ___ U.S. ___, 113 S. Ct. 2637 (1993) 1

Hirsch v. Oakeley Vaughan Underwriting Ltd., No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990) 4, 7

Howe v. Goldcorp. Inves., Ltd., 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992) 8, 19

Hudson v. McMillian, ___ U.S. ___, 112 S. Ct. 995 (1992) 1

In re Bank of Boston Corp. Sec. Lit., 762 F. Supp. 1525 (D. Mass. 1991) 18

Landoil Resources Corp. v. Alexander & Alexander Servs., Inc., 77 N.Y.2d 28, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990) 2

M/S The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 10, 12, 15, 16, 21, 22

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 10, 13, 14, 21

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) 19

Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992) 3, 4, 7, 8, 17

TABLE OF AUTHORITIES – Continued

Page

Rodriguez de Quijas v Shearson/American Express, Inc., 490 U.S. 477 (1989) 6

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 10, 11, 15, 21, 22

Wilko v. Swan, 346 U.S. 427 (1953)..... 6

STATUTES AND TREATIES

Securities Act of 1933, 15 U.S.C. § 77a, *et seq*.....18, 19

Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*..... 12

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (adopted and codified by 9 U.S.C. §§ 201-208)..... 6

MISCELLANEOUS

J. William Hicks, 7D *Exempted Transactions Under the Securities Act of 1933* (1992) 18

L. Loss, *Fundamentals of Securities Regulation* (1983) 18

McLaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention – Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249 (1986) 14

S. Ct. R. 14.1(a) 1

COUNTERSTATEMENT OF THE CASE

Respondents incorporate by reference the statements of fact in the opinions below (*Petition* at 7c-11c, 3d-6d, 2e-6e). As the courts below found, this is not a case involving the sale of publicly traded securities. Rather, it involves petitioners' memberships in Lloyd's, a unique and very English institution. Lloyd's is not an insurance company; it is a market, in which individuals such as petitioners (known as "Members" or "Names" at Lloyd's; see *Petition* at 3e) underwrite insurance risks on the basis of unlimited liability for their own losses and no liability for those of any other Member. Members are organized for administrative purposes into syndicates or groups of Members whose assets provide the capital against which risks are underwritten.[1] A professional Underwriter, himself a Member, makes the actual underwriting decisions, acting on authority delegated to him by the Members who have pledged some or all of their assets to capitalize

---

[1] Petitioners originally sued their syndicates, but those claims were dismissed by the District Court on the ground that syndicates are not juridical entities under English or American law. *Petition* App. D. The Court of Appeals saw no reason to reach review of the District Court's ruling on this question in light of its finding that the forum clauses in issue were so broad that they would encompass the syndicates if need be. Petitioners do not seek review of the rulings of the courts below on this point. *See* Supreme Court Rule 14.1(a); *Heller v. Doe*, ___ U.S. ___, 113 S. Ct. 2637, 2650 n.4 (1993); *Hafer v. Melo*, ___ U.S. ___, 112 S. Ct. 358, 361 n.* (1991); *Hudson v. McMillian*, 112 S. Ct. 995, 1002 (1992). Accordingly, the so-called Syndicate Defendants are filing no response to the Petition.

his efforts for a given year. Most Members participate in more than one syndicate each year.[2]

The market at Lloyd's is regulated by respondents the Society, Corporation, Committee and Council of Lloyd's pursuant to delegated English statutory powers, analogous to the way that the New York Stock Exchange governs its membership. English statutes, and Lloyd's byelaws made pursuant to those statutes, establish the organizational pattern within which Managing Agents and Members' Agents have well-defined roles. Managing Agents manage the syndicates through which Members underwrite insurance risks. Members' Agents, among other things, provide Members with information regarding possible syndicates in which to participate.

More than 80 percent of the Membership at Lloyd's is English; the remainder come from some 80 different countries. American Members such as petitioners have historically constituted at most about eight percent of the total membership of Lloyd's, some 30,000 at its peak, and there are even fewer American Members today. These 110 petitioners are but a small fraction of the Americans who were Members of Lloyd's during the years pertinent to these claims.

---

[2] Contrary to petitioners' assertions (*Petition* at 5 n.1), syndicates do *not* do business in the United States by virtue of the Lloyd's American Trust Fund (a fund held in trust in the United States for the sole benefit of United States policyholders). In *Landoil Resources Corp. v. Alexander & Alexander Serv., Inc.*, 77 N.Y.2d 28, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990), the Court of Appeals for the Second Circuit certified precisely this question under New York law to the Court of Appeals for the State of New York, which answered it with a resounding negative.

Persons such as petitioners, who wish to join Lloyd's, must apply for membership, must satisfy a test of good character, must be sponsored, must acknowledge their understanding of the risk of unlimited loss, must submit evidence of their financial ability to withstand losses, and must go to England to be interviewed and to sign their membership agreements. Although petitioners seek to characterize their insurance obligations as "securities," membership is personal; it cannot be assigned or traded.

The membership agreements signed by petitioners with Lloyd's (the General Undertaking) and with the Agents (the Agency Agreements) each contain broad forum selection clauses giving exclusive jurisdiction over disputes to the courts of England, and choosing English law to govern the parties' relationships. In addition, the Agency Agreements contain broad arbitration clauses. These clauses are necessary so that Lloyd's may govern its market coherently, under one legal system, for the benefit of all its members, and for the protection of policyholders throughout the world.

It is in this context that no fewer than three U.S. Circuit Courts of Appeals have recently enforced the forum selection and arbitration clauses in Members' agreements with Lloyd's and with the Agents in virtually identical cases alleging violations of United States securities laws, among them the Court of Appeals for the Second Circuit in this case.[3] There were no dissenting

---

[3] The Seventh and Tenth Circuits have upheld dismissals in virtually identical cases. *See Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 658 (1992). In addition, the Court

opinions in any of these cases, and no Circuit Court has ruled to the contrary. This Court has already denied *certiorari* in the *Riley* case.[4]

Contrary to the statement of this case provided by petitioners, the holdings below, and those of other Courts of Appeals, are not a threat to American investors. These holdings explicitly are limited to the unique facts of these cases, as to which they are entirely fair and appropriate. petitioners' complaint alleged fraud and misrepresentation against all of the respondents. The District Court dealt with the case as one sounding in fraud, holding that English law provides adequate remedies for fraud such that it was reasonable to require petitioners to abide by their forum selection and arbitration clauses. In so doing, the District Court had before it a number of affidavits attesting to the extensive public and private remedies available under English law for fraud, for negligent misrepresentation, and for breach of contract.[5] It held that this case was, "closer to being entirely English than it is

---

of Appeals for the Fifth Circuit dismissed tort claims brought by a Member against Lloyd's on the ground of *forum non conveniens* in favor of England. *Hirsch v. Oakeley Vaughan Underwriting Ltd.*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990).

[4] 113 S. Ct. 658 (1992).

[5] These affidavits came from English barristers on both sides of this case. There was no serious disagreement among them as to the significant remedies English law would provide to these petitioners. *See, e.g., Petition* at 20e-21e, 24c-27c for discussions of the evidence as to the available provisions of English law contained in the opinions of the courts below. *See also infra* pp. 16-19.

to being either international or a domestic American dispute."[6] The District Court discussed the specific English remedies available to petitioners, and found that it was fair to require petitioners to abide by their agreements to submit their disputes to English courts and arbitrators.

Petitioners argued to the Court of Appeals that English remedies were not adequate because English law, they represented, would require them to show proof of scienter and/or proof that the omissions they complained of had rendered misleading some affirmative statement made to them by respondents. This, they claimed, they could not do. Petitioners admitted to the Court of Appeals that they had no expectation of being able to prove many of the allegations contained in their Complaint even under U.S. law. Now, to this Court, petitioners present their case as essentially a failure to register case under § 12(1) of the Securities Act of 1933, the only U.S. statute alleged in the 169 paragraph Complaint for which there is no precise English law analogue. In doing so, petitioners implicitly concede that the rulings below on their § 12(2), Rule 10b-5, and RICO claims

---

[6] *Petition* at 17e.

provide no basis upon which *certiorari* is warranted.[7] This tempest is now truly presented in a teapot.[8]

---

[7] Similarly, petitioners argued to the District Court that *Wilko v. Swan*, 346 U.S. 427 (1953) is still good law, and based their case largely on that precedent. Told by the District Court that *Wilko* was "flatly overruled" in *Rodriguez de Quijas v Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (*Petition* at 17e), petitioners proceeded to the Court of Appeals on the basis that, though overruled, *Wilko*'s "essential lesson" lives on. Rejected again (*Petition* at 18c), petitioners now present *Wilko* to this Court in a footnote (*Petition* at 9 n.5) as a basis for attempting to argue that the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3 (adopted and codified by 9 U.S.C. §§ 201-208), does not apply here. Petitioners further misrepresent to this Court that the Court of Appeals so held, when in fact that Court held that it did not have to reach that issue in light of its determination that the forum selection and arbitration clauses in petitioners' various agreements were enforceable (*Petition* at 19c n.2). It will thus be for the English courts to determine whether petitioners must submit their disputes with their Agents to an English court or to an English arbitral panel.

[8] Although petitioners complain here, as they did in the courts below, about the supposed inadequacy of the remedies available to them in England, even prior to the decision of the district court in this case, some petitioners also brought actions against respondents in English courts, advancing claims stemming from the same events that underly this case. As of the date of this brief, at least 49 of the 110 petitioners are in lawsuits pending in England. Cases involving these petitioners are firmly set for trial in April and October, 1994.

REASONS FOR DENYING THE PETITION

I.

The Decision Below Follows the Decisions of this Court and of all Courts of Appeals that have Considered Identical Cases

The decision below follows this Court's consistent holdings and the decisions of the circuit courts, and petitioners seek review of jurisprudence as to which *certiorari* has been repeatedly denied. There are no new issues requiring review by this Court.

Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 658 (1992), and *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993), dismissed the same causes of action by American Names who signed the same contracts, and joined many of the same syndicates, as petitioners. *Hirsch v. Oakeley Vaughan Underwriting Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion (5th Cir. May 31, 1989), *cert. denied*, 498 U.S. 981 (1990), dismissed, in a case that arose from activities prior to the time when the Choice Clauses at issue here were included in membership contracts, a similar action by a Name against Lloyd's on grounds of *forum non conveniens*.[9]

---

[9] The district court below dismissed on the Choice Clause, but also agreed with *Hirsch*:

> "The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds." *Petition* at 21e.

Ordinary *forum non conveniens* considerations, which dictate dismissal in favor of the courts of a foreign country, apply

Including this case, the three circuit courts of appeal which have examined the same fact pattern pleaded herein and the same legal arguments proffered herein[10] uniformly – without so much as a single dissenting or even concurring opinion – have enforced petitioners' contractual undertakings to utilize exclusively court proceedings or arbitration in England for any dispute arising out of or relating to their membership or underwriting at

---

equally to actions brought under the United States securities laws. *Howe v. Goldcorp. Inves., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1172 (1992). The court below correctly held, *a fortiori*, that international contractual agreements to achieve the same result should be honored.

[10] Petitioners' are careless in their assertion (Pet. at 19) that their arguments "about the effect of anti-waiver provisions and the adequacies of English law were not made [in *Riley*]". In fact, the same arguments have been made in each case and each court has found them ill-founded. *See, e.g.*, the *Petition for Certiorari* in *Riley*, No. 92-664 at pages 13-14:

> "I. B. The Choice Clauses at Issue Herein Operate to Waive Mr. Riley's Substantive Statutory Rights Under the U.S. Securities Laws."
>
> "II. B. Fundamental Public Policy is Violated When Enforcement of an Arbitration Clause Waives the Substantive Protections of the U.S. Securities Laws."

Petitioner in *Riley*, like petitioners here, argued that English law was inadequate because it would not recognize claims under the U.S. securities laws, and because of the limited immunity for Lloyd's governing bodies under the Lloyd's Act 1982. *Id.* at 14, 20. Petitioner in *Riley*, exactly like petitioners here, *extensively* briefed to both the Tenth Circuit and this Court the anti-waiver provisions of the 1933 and 1934 Acts and the supposedly far-reaching implications of the ruling on all sorts of foreign issuers of conventional securities. *See, e.g., id.* at 10-12, 22.

Lloyd's. Each court has applied the clearly articulated jurisprudence of this Court to the unique facts presented by the contractual participation of foreign underwriters in the Lloyd's insurance market. The courts below stressed the singular and complicated nature of Lloyd's, and the complex of unusual agreements which define the status of underwriting members at Lloyd's such as petitioners. District court opinion at *Petition* pp. 3e-6e, 9e-16e; circuit court opinion at *Petition* pp. 6c-9c, 11c-17c. As stated by the court below:

> We are satisfied not only that the Roby Names have several adequate remedies in England to vindicate their substantive rights, but also that in *this* case the policies of ensuring full and fair disclosure and deterring the exploitation of United States investors have not been subverted.
>
> [W]e hold . . . that the Roby Names have remedies under English law adequate not only to vindicate their substantive rights but also to protect the public policies established by the United States securities laws.

Petition at 24c, 27c (emphasis in original).

When petitioners entered a commercial relationship by becoming insurance underwriters, they and respondents agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England."[11] These

---

[11] The text of the relevant paragraph from the General Undertaking can be found in the opinion of the Second Circuit

Choice Clauses were an integral part of a bargain which petitioners enjoyed for a number of years, and now seek to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

In *The Bremen* (not cited by petitioners), a contract for towing a drilling rig from Louisiana to Italy provided for judicial resolution of disputes in an English forum. In transit, the rig suffered storm damage and was towed to Tampa, Florida. In Florida the owner, like petitioners herein, "ignoring its contract promise to litigate 'any dispute arising' in the English courts," 407 U.S. at 3, filed suit in the United States district court. The district court denied a motion to dismiss, and the Court of Appeals affirmed, holding the forum-selection clause unenforceable on public policy grounds because the plaintiffs' claims would be subject to exculpatory clauses in England, but not in the United States, where they were against public policy. This Court reversed. Pointing out the "expansion of overseas commercial activities by business enterprises based in the United States," 407 U.S. at 9, it observed:

---

at the top of page 12c of the *Petition*: "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [petitioner's] membership of, and/or underwriting of insurance business at, Lloyd's." Relevant provisions from the Agents' Agreements can be found in the district court's opinion at pp. 4e-6e of the *Petition*.

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

Chief Justice Burger explained the reasons guiding the Court's ruling as follows: first, as here, a number of jurisdictions could otherwise be the situs of suit, and the parties justifiably wished to avoid the uncertainty and inconvenience which could come to pass as a result. 407 U.S. at 13. Secondly, the choice-of-forum clause was a "vital part of the contract" (as the Choice Clauses certainly were here, embracing two of the three substantive paragraphs in the General Undertaking; *see Petition* at 4a-5a) and the Court quoted with approval the statement of the English High Court of Justice that:

> [T]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful.

407 U.S. at 14. Finally, this Court concluded with a strong endorsement of the forum-selection clause:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

407 U.S. at 15.

In *Scherk*, a contract covering the sale of several German businesses and associated trademarks provided for arbitration in France as the forum, with Illinois law as the applicable law. Like petitioners here, the American company sought to repudiate its contract, and filed suit

in Illinois claiming violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. The district court and the court of appeals held the Choice Clauses, in particular the arbitration clause, to be unenforceable. This Court again reversed, as it had in *The Bremen*. Speaking through Mr. Justice Stewart, this Court discussed its rationale for honoring Choice Clauses in international transactions. It emphasized the advantages to those engaged in international commerce in eliminating uncertainties in the applicable law, stating:

> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

This Court rejected the post-contract forum shopping so vividly illustrated by the instant case:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

417 U.S. at 516-7. It reaffirmed the rationale and reasoning of *The Bremen*, 417 U.S. at 518.

This Court next decided *Mitsubishi*, holding that an agreement requiring arbitration in Japan is valid and enforceable and extends to statutory claims under the U.S. antitrust laws. In its analysis, this Court repeated, once more and in detail, the principles applicable to commercial transactions in international commerce, emphasizing the need for certainty and predictability in international dealings:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context. . . .
>
> Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court [in *The Bremen*] gave effect to the choice-of-forum clause.

473 U.S. at 629. The Court condemned reliance upon purely domestic policies as a ground for striking down a choice clause, and summarized the law in these terms:

> *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the

> same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.

473 U.S. at 631. *Accord, Carnival Cruise Lines, supra; Development Bank of Philippines v. Chemtex Fibres, Inc.*, 617 F.Supp. 55, 57 n.12 (S.D.N.Y. 1985) (concluding from *Mitsubishi* that "it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims"); Mclaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention – Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249, 260 n.69 (1986).

Accordingly, the court below reinforced the *Mitsubishi* holding: "Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and cooperation of foreign tribunals. *See Mitsubishi*, 473 U.S. at 629." *Petition* at 19c.

II.

The Decision Below Raises no New Issue

Petitioners' overheated contention that the court below utilized a "novel" approach to the enforcement of Choice Clauses that will supposedly create a gaping "loophole" in the American securities laws, resulting in mass exemption for hundreds of foreign "issuers" and a "severe competitive disadvantage" for American companies (*Petition* at 11-12), is built on a gross misstatement of what the courts below actually did. What these courts did, far from creating a rule with implications for other cases, was to go out of their way to limit their analyses to the facts and circumstances of the Choice Clauses at issue

in this case, and the unique nature of an underwriting Name's commercial relationships with his or her Members' and Managing Agents at Lloyd's, and with Lloyd's itself. It is sheer hyperbole to suggest that the Second Circuit's narrow, fact-bound opinion has *any* implications, much less far-reaching ones, for hundreds of foreign issuers of conventional securities, and it is nonsense to hint that those issuers are in any way comparable to Lloyd's. There is nothing in the record to support petitioners' assertions.

Nor did the courts below in any way employ a "novel" approach to the enforcement of Choice Clauses, contrary to petitioners' bald assertions (*see Petition* at 10, 13 n.11). Even apart from the fact that this Court has upheld Choice Clauses in an unbroken line of decisions stretching back over twenty years – a trend petitioners ignore – the Second Circuit's analysis in this case is patterned exactly on the analysis employed by this Court in *The Bremen* and *Scherk*. As the Second Circuit noted, those cases require a court considering the enforcement of a Choice Clause in an international contract to start with a presumption of the Clause's validity that can only be overcome by a "clear showing that the clauses are " 'unreasonable' under the circumstances." " *Petition* at 20c, *quoting The Bremen*, 407 U.S. at 10. As the court below noted, this Court has made this exception a very narrow one: a Choice Clause will be enforced unless its inclusion in the contract was procured by fraud, "if the complaining party 'will for all practical purposes be deprived of his day in court,' due to the grave inconvenience or unfairness of the selected forum", if plaintiff would be

deprived of all remedy, or if enforcement would violate a strong public policy. *Petition* at 20c.

The Second Circuit's analysis thus comes almost *verbatim* from *The Bremen*. *Compare* 407 U.S. at 15, 18-19. The only way one could call it "novel" would be to ignore *The Bremen* which, astonishingly, is what petitioners have done. The case is not cited in the *Petition*.

Petitioners do not even take issue with most of the Second Circuit's ruling. Petitioners argued below, but no longer, that they would be gravely inconvenienced by having to litigate in England.[12] *Id*. The district court was so unmoved by the balances of convenience argument that it indicated that had it not dismissed on the Choice Clauses, it would likely have granted respondents' fully briefed motion to dismiss on grounds of *forum non conveniens*. *Petition* at 21e. Petitioners suggested below, but no more, that English courts or arbitral forums would be unfair or biased. *Petition* at 20c.[13]

Petitioners fail to demonstrate how they are seriously harmed by enforcement of their Choice Clauses. At most, the *Petition* can be read to complain that the court below "misunderstood" and made "speculative and unsupportable" assumptions about the claims and remedies English law affords petitioners. *Petition* at 13. Nothing could be further from the truth. For example, petitioners brazenly

---

[12] But not so gravely inconvenienced that 49 petitioners herein have in fact brought actions there. *See* footnote 4, *supra*.

[13] Petitioners never alleged, for example, that they were fraudulently induced into agreeing to the Choice Clauses. *Petition* at 20c.

claim that they can only impose liability on the Members' and Managing Agent respondents under "fault-based" theories that "require proof of fraudulent intent" (*Petition* at 15), yet petitioners conceded that they have available in England claims and remedies sounding in the tort of deceit; Sections 2(1) and 2(2) of the Misrepresentation Act 1967; and claims for pre-contractual material misleading omissions. The Second Circuit relied on the affidavit of petitioners' own expert when it concluded that English law "provides remedies for knowing or reckless deceit, negligent misrepresentation, and even innocent misrepresentation." *Petition* at 24c.[14]

Furthermore, as the court below correctly found, both the Members' and Managing Agents have express contractual obligations to make fair disclosure to their Names, and petitioners do not dispute the Second Circuit's finding that claims based on alleged failures to make material representations can be asserted in England under theories of breach of contract and violation of fiduciary duty – claims which clearly do not require proof of fraudulent intent. *See Petition* at 25c-26c. Indeed, English law is more favorable to petitioners in some ways than American law, for it would enable petitioners, if they can establish liability, to recover legal costs even under common law theories, and because English limitations periods are substantially longer than their U.S. counterparts. In sum, the court below was amply justified in concluding that "the available remedies [in England]

---

[14] There is no dispute that English law provides remedies for fraud. *Petition* at 24c, 26c. *See also Riley*, 969 F.2d at 958.

are adequate and the potential recoveries substantial." *Petition* at 24c.

Petitioners abandoned the argument made below that English law is inferior to American law because it does not make "mere omissions" actionable unless something that is said is rendered misleading, in supposed comparison to § 12(2) of the 1933 Act, after respondents showed conclusively that the English and American standards are the same.[15] Petitioners complain that "controlling person" liability does not exist under English law, but as the court below noted, petitioners would have grave difficulty prevailing on such claims here. *Petition* at 15, 24c. Petitioners' unequivocal allegation that respondents the Society, Corporation, Committee and Council of Lloyd's "are not subject to liability at all" (*Petition* at 15) is false, as the court below found. *Id.* at 25c.

Petitioners appear to claim that it would be "fundamentally unfair" for English law to require them to demonstrate both wrongdoing and causation on the part of the alleged wrongdoer (each of whom has been identified in the complaint as a "racketeer"). *See Petition* at 14-15. As the court below found, "it certainly is not unfair for

---

[15] The plain language of § 12(2) imposes liability only for omissions of material facts "necessary in order to make the statements . . . not misleading." It is black letter law that § 12(2) does not impose liability for "mere omissions" unless some affirmative statement is rendered misleading. *See* Loss, *Fundamentals of Securities Regulation* 1023 (1983); *In re Bank of Boston Corp. Sec. Lit.*, 762 F. Supp. 1525, 1538 (D. Mass. 1991). *See also* J. William Hicks, 7D *Exempted Transactions Under the Securities Act of 1933* § 16.05(7) at 16-210 and n.2 (1992).

English law to require proof of actual misconduct and reliance." *Petition* at 24c.[16]

That basically leaves petitioners with their § 12(1) claims, premised on the supposed failure to comply with the registration requirements of the 1933 Act.[17] But as the court below noted, those claims face severe difficulties. *See Petition* at 25c. The SEC has determined that if any "security" is involved in petitioners' underwriting of insurance at Lloyd's, compliance with Regulation D (governing limited offerings to qualified investors) meant that no registration would be required. *See* Commission letter, attached hereto as respondents' Appendix A. Petitioners' contention that the SEC has "defaulted" by supposedly not taking a "publicly disclosed, principled position"

---

[16] Contrary to petitioners' implicit suggestion, it is not necessary that the foreign law afford precisely the same remedy as American law, merely that the foreign forum provide some form of remedy. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (in the analogous area of decisions rendered under the doctrine of *forum non conveniens*, the possibility that the law of the more convenient forum will be less favorable to plaintiff can preclude dismissal only if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all"). *Accord, Howe v. Goldcorp Inv. Ltd.*, 946 F.2d 944, 952 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992) (dismissing securities fraud claims by American investor in Canadian company where Canadian law offered "somewhat similar protections").

[17] Petitioners do not argue that their pleading of boilerplate RICO counts is a reason to grant *certiorari*. The transformation of this case from a fraud and racketeering extravaganza into an alleged failure to comply with the registration requirements of the securities laws is one of the more remarkable of petitioners' retreats.

(*Petition* at 21) is disingenuous in the extreme: The Commission's letter was mailed to a United States Congressman, among others, to answer questions put by the name plaintiff below, petitioner John Steiner Roby. The SEC's position is both public and principled.[18] Petitioners' dissatisfaction with the view taken by the regulatory agency is hardly a proper ground for *certiorari*, particularly when the agency in question is not a party to this litigation and has refused petitioners' invitation to intervene.[19] To the extent it has not already been addressed herein, petitioners' argument that this case is about construction of the statutory phrase "waive compliance" was not presented to the courts below. Petitioners never made the "essential feature" argument (*see Petition* at 14), nor did

---

[18] If the SEC's position is accepted, all of the claims pleaded by petitioners here vanish. Petitioners' contention that the court below was "procedurally wrong" in considering the merits of their § 12(1) claims (*Petition* at 17 n.15) is equally disingenuous: respondents had moved to dismiss the § 12(1) claims on a variety of grounds, including statute of limitations, failure to allege "seller" status of certain defendants, and failure to allege controlling person status. In addition, the Commission's letter was in the record below, was quoted by Judge Lasker (*see Petition* at 14d-15d) and was referred to, albeit not by name, by the Second Circuit (*see Petition* at 25c).

[19] At oral argument before the Second Circuit, petitioners' counsel responded to a direct question from that court by admitting that petitioners had asked the SEC for support in this litigation and had been rebuffed. The agency would have a perfectly good reason for not wanting to give an advisory opinion on the enforceability of Lloyd's Names' Choice Clauses: under the agency's already expressed view, the question in the context of this case is entirely moot.

they cite any of the cases that appear at page 15 of the *Petition*.

Since the issuance of the decision below, the Seventh Circuit's decision involving these same forum selection provisions confirms its correctness, and confirms that there are no new issues requiring review by this Court. *Bonny v. The Society of Lloyd's*, Nos. 92-1662, 92-2771, 1993 WL 292345 (7th Cir. Aug. 5, 1993). Having carefully reviewed this Court's decisions in *Bremen*, *Scherk*, *Mitsubishi Motors* and *Carnival Cruise Lines*, and the singular factual details of the arrangements by which an individual obtains the right to participate in insurance underwriting at Lloyd's, the Seventh Circuit came to the same correct result as the court below:

> In the present case, we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors. 1993 WL 292345 at *4.

Far from creating any "loophole" in the protection afforded to Americans interested in participating at Lloyd's, as argued by petitioners, the decision as to which review is sought expressly addressed that potential concern. The court simply concluded that petitioners failed to make a showing that the specified remedies available to them in England were insufficient, in the light of petitioners' own expert's affidavit. There is nothing in the decision below warranting review.

Finally, although the decision below dismissed petitioners' case on the basis of the contractual Choice

Clauses, petitioners' claims here were never more than shaky, for at least the following reasons:

a) The District Court also had dismissed the action against most defendants because of petitioners' binding agreements with them to *arbitrate* any disputes. Said the court below:

> We might have referred to the [United Nations] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 . . . for further support with respect to the arbitration clauses. *Petition* at 19c n.2.

It did not, but rather relied on *The Bremen* jurisprudence of this Court for forum selection clauses, because "an arbitration clause is merely a specialized type of forum selection clause. *See Scherk*, 417 U.S. at 519." *Id.* As the District Court ruled: "none of the three rationales plaintiffs assert for the non-application of the Convention is persuasive." *Petition* at 18e.

b) Claims against over twelve hundred of the named defendants (the "syndicates") had already been dismissed because those defendants were found to lack juridical status in either the United States or the United Kingdom. Petitioners do not question that ruling here.

c) Ordinary *forum non conveniens* considerations independently dictated sending petitioners' claims to England:

> The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds. *Petition* at 21e.

d) Also pending before the District Court were fully-briefed motions to dismiss the complaint for failure to plead fraud with particularity, failure to plead with specificity controlling person liability and other defects in stating a Securities Act cause of action, failure to plead adequately the alleged RICO violations, and failure to plead compliance with the statute of limitations.

e) The SEC had previously determined that petitioners held no "security" that required registration.

CONCLUSION

The petition for *certiorari* should be denied.

TAYLOR R. BRIGGS
Counsel of Record
SHEILA H. MARSHALL
MARY L.B. BETTS
STEPHEN H. OREL
LEBOEUF, LAMB, LEIBY & MACRAE
125 West 55th Street
New York, New York 10019
(212) 424-8000
Counsel for Respondents
The Society, Corporation, Committee and Council of Lloyd's and their Individual Internal Members

THOMAS W. WILSON
JONATHAN C. THAU
NICHOLAS J. CONCA
FRED N. KNOPF
WILSON, ELSER, MOSKOWITZ & DICKER
150 East 42nd Street
New York, New York 10017
(212) 490-3000
Counsel for the Members' Agent Respondents

DANIEL M. BIANCA
LEO W. FRASER, III
WILLIAM A. MEEHAN
MENDES & MOUNT
750 Seventh Avenue
New York, New York 10019
(212) 261-8000
Counsel for the Managing Agent Respondents

APPENDIX A

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
EXECUTIVE DIRECTOR

Stop 2-6

October 11, 1991

Taylor R. Briggs, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

RE: FOIA #91-1351

Dear Mr. Briggs:

This is in response to your letter dated October 3, 1991, and received in this Office on October 4, 1991, in which you request access to a letter from Ms. Mary E.T. Beach to Don J. Pease concerning Lloyd's of London's solicitation of American citizens to become participants in Lloyds, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. We have identified the responsive letter and made a determination to grant access. A copy of the letter is enclosed. If you have any questions, please contact Arleta D. Cunningham of my staff at (202) 272-3651

Sincerely,

[Hannah R. Hall]

Hannah R. Hall
FOIA/Privacy Act Branch Chief

Enclosure

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

August 5, 1991

CHAIRMAN'S OFFICE
MAILED
AUG 5 1991

The Honorable Don J. Pease
United States House
of Representatives
2410 Rayburn Building
Washington, D.C. 20515

Signed by: _____

Re: Lloyd's of London

Dear Congressman Pease:

I have been asked to respond to your letter of June 20, 1991 in which you ask certain questions pertaining to a letter you received from one of your constituents, Mr. John Steiner Roby. Mr. Roby's letter concerns the solicitation of American citizens to become participants in Lloyd's of London ("Lloyd's") by becoming Names, and the subsequent losses of those who become Names.

Before we address your specific questions perhaps it would be helpful if we briefly described the unique structure of Lloyd's, as it is not an insurance company in the manner of a typical U.S. insurance company. There are three basic components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's

(the "Council") which is the body charged with regulating the entire Lloyd's structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their underwriting business exclusively through "Members' Agents". All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over Members' syndicate participation. Finally, the active insurance underwriters at the end of the chain are principals or employees of "Managing Agents", which are U.K. Corporations or partnerships approved by the Council to accept insurance risks at Lloyd's. Managing Agents are either also Members' Agents or are the agents of such Members' Agents.

Your first question is whether there is any regulation of Lloyd's solicitation of participations in the United States. The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of

U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate.

Your second question is whether the participations in Lloyd's are analogous to partnerships and what regulations apply to those types of investments. While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments. For example, they may only be held by individuals, they are not transferable, even under the laws of descent and distribution, and the liability thereunder is unlimited although no Name is liable for the "share" of other Names. There is no existing precedent as to whether Lloyd's participations are securities but, as was pointed out above, the Division of Corporation Finance believes

they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.

Finally, you ask whether U.S. participants in Lloyd's properly can obtain venue in litigation against Lloyd's in the United States. Your constituent asserted that litigation against Lloyd's in the United States has been terminated as not being properly venued. We are not aware of the litigation to which your constituent refers, although it may involve a cause of action outside the Federal securities laws. However, subject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

I hope that the above material will be helpful in responding to your constituent's concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Mary E. T. Beach
Senior Associate Director

No. 93-333 (3)

Supreme Court, U.S.
FILED
OCT 14 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN S. ROBY, *et al.*,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

DALE A. SCHREIBER
Counsel of Record for Petitioners
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3475

Of Counsel:
MINNA SCHRAG
STEVEN B. FEIGENBAUM
PROSKAUER ROSE GOETZ & MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

October 14, 1993

11 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Pages

Point I: This Court Should Review the Court of Appeals' Novel Test —— Under Which Any Foreign Issuer Can Avoid Securities Regulation —— for Determining Whether There Has Been a Violation of the Anti-Waiver Provisions 2

Point II: The SEC Has Not Expressed a View about Petitioners' Claims. It Should Be Invited to Submit its Views Now 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES

Dooner v. NMI, Ltd.,
725 F. Supp. 153 (S.D.N.Y. 1989) 6

Hector v. Wiens,
533 F.2d 429 (9th Cir. 1976) 6

International Bhd. of Teamsters v. Daniel,
439 U.S. 551 (1979) 6

M/S Bremen v. Zapata Off-Shore Co.,
407 U.S. 1 (1972) 3

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) . . . . . *passim*

SEC v. W.J. Howey Co.,
328 U.S. 293 (1946) 6

SEC v. Ralston Purina Co.,
346 U.S. 119 (1953) 3

Scherk v. Alberto-Culver Co.,
417 U.S. 506 (1974) 3

United Housing Found., Inc. v. Forman,
421 U.S. 837 (1975) 6

STATUTES

Securities Act of 1933, Section 12(1)
15 U.S.C.§77*l*(1) . . . . . *passim*

Securities Act of 1933, Section 12(2)
15 U.S.C.§77*l*(2) . . . . . *passim*

Securities and Exchange Commission Rule 10b-5
17 C.F.R. §240.10b-5 . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
No. **93-333**

JOHN S. ROBY, et al.,

Petitioners,

—v.—

THE CORPORATION OF LLOYD'S, et al.,

Respondents.

REPLY MEMORANDUM IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Without ever addressing the central issue presented in the petition —— whether choice-of-law and forum selection clauses contained in a foreign issuer's standard documentation can be enforced in the face of the anti-waiver provisions of the 1933 and 1934 Acts, when enforcement deprives American investors of basic rights and remedies under the Acts —— respondents present a flurry of inaccurate and disingenuous arguments in urging the Court to deny the petition.

In brief, respondents argue that (1) Lloyd's is unique and the Court of Appeals' decision is so intensively fact based that other issuers will be unable to rely on the decision to justify use of similar clauses to avoid the requirements of the 1933 and 1934 Acts (Opposition at 15); (2) the Court of Appeals' standard for enforcing the anti-waiver provisions is not novel, as petitioners contend, but instead solidly based on precedent from this Court (Opposition at 14-

15); (3) petitioners' argument about the anti-waiver provisions, and in particular about the phrases "waive compliance" and "essential feature", was not presented to the courts below, and petitioners have supposedly "conceded" that the prospect of a future dismissal of their claims under §12(2), Rule 10b-5 and RICO undermines petitioners' basis for *certiorari* (Opposition at 5-6, 18-19, 20); (4) investments in Lloyd's syndicates are not full-fledged securities under the 1933 and 1934 Acts (Opposition at 3); and (5) the SEC has already expressed the views that petitioners did not purchase securities that require registration and that Lloyd's choice-of-law and forum selection clauses are enforceable (Opposition at 20 n.19, 23). Each of these arguments is wrong. Petitioners address the first three contentions in Point I, and the remaining two contentions in Point II.

Point I: This Court Should Review the Court of Appeals' Novel Test —— Under Which Any Foreign Issuer Can Avoid Securities Regulation —— for Determining Whether There Has Been a Violation of the Anti-Waiver Provisions.

In *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), Justice Kennedy set forth this Court's standard for finding violation of the anti-waiver provisions. Reflecting a view that appeared to have the Court's unanimous support, he wrote that impairment of an "essential feature" of the 1933 or 1934 Acts, such as a shift in the burden of proving lack of scienter, would be barred by the anti-waiver provisions. 490 U.S. at 481.

The test applied by the Court of Appeals here eviscerates that standard. Under the Court of Appeals' test, impairment of the remedial provisions of the Acts, and an increased burden in the proof required to sustain a claim, do not violate the anti-waiver provisions. Prohibited waiver will only be found where there is substantial impairment of the Acts' transactional mandates, caused, for example, by insufficient incentive under foreign law to deter exploitation of American investors. Contrary to Justice Kennedy's clear statement in *Rodriguez*, the Court of Appeals' test severs "transactional" compliance from "remedial" compliance.

It is the Court of Appeals' test that is unique in this context, and not any special feature of Lloyd's. It is that test's virtual elimination of the anti-waiver provisions that makes the Court of Appeals' decision broadly applicable to all foreign issuers. Nothing in the facts or in the Court of Appeals' analysis limits its holding to Lloyd's.

Respondents ignore *Rodriguez* and the novelty of the Court of Appeals' test. Instead of focussing on Justice Kennedy's statements about impairment of essential, remedial rights, they cite *The Bremen* and *Scherk* as the "pattern" for the Court of Appeals' test. (*The Bremen* has nothing to do with statutory anti-waiver provisions or laws creating federal rights, and neither case offers any precedent for the Court of Appeals' test).

Respondents claim, erroneously, that petitioners did not raise the "essential features" argument below. In fact, petitioners relied on *Rodriguez* below (see petitioners' Brief on Appeal, pp 32-36) and raised the anti-waiver clauses at every stage of this proceeding. At oral argument before the Court of Appeals, considerable attention was paid to the details of the test employed by this Court for finding violation of the anti-waiver provisions, and the "essential features" test was explored then.

Respondents also contend, erroneously, that petitioners have conceded that the only claims this petition seeks to preserve are those brought under §12(1) and that petitioners have abandoned their effort to litigate in American courts, under American law, claims under §12(2), Rule 10b-5 and RICO.[1] The questions presented for review

---

[1] In extraordinary disregard for the carefully constructed system of regulation under the federal securities laws, respondents characterize the §12(1) claims as a "tempest in a teapot". (Opposition at 6). To the contrary, the disclosures mandated under §12(1) are at the heart of the securities laws. *See SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953).

Respondents also note, as if it were a concession, that petitioners do not seek review of the district court's dismissal of their claims against the

(continued...)

by this Court concern the Court of Appeals' ruling about the anti-waiver provisions, not the underlying claims. But beginning with the statement of the questions presented (Petition at i) and continuing throughout, petitioners have made clear that none of the claims have been abandoned.

Respondents contend (Opposition at 18) that petitioners have abandoned their §12(2) claims because (1) respondents supposedly showed "conclusively" (despite an unchallenged affidavit to the contrary submitted by petitioners to the district court) that English and American laws are the same regarding responsibility for misleading omissions.[2], and (2) differences between American and English law regarding proof of scienter and causation should be disregarded as not fundamentally unfair.

By that very argument, respondents demonstrate that they have failed to satisfy the test set forth by this Court in *Rodriguez*. Significantly different standards in England for the kinds of omissions that would render a prospectus misleading, and imposition by English law of burdens to prove scienter and causation, would deprive aggrieved American investors of remedies granted to them by §12(2). The Court of Appeals (although in error, petitioners contend, in many of its conclusions about English law) found that those differences exist. (Petition at 24c-26c). It is those differences that present precisely the kind of impairment of essential features prohibited under this Court's *Rodriguez* standard.

---

[1](...continued)
syndicates on the ground that the syndicates' lack of juridical status under English law precluded their being sued under the securities laws. That question is not presented for review here because the Court of Appeals did not reach it, but instead resolved it, for argument's sake, in petitioners' favor.

[2] Moreover, petitioners showed that under long-standing lower court precedent the syndicate lists disseminated to Lloyd's investors are sufficient to trigger the obligation to disclose omitted facts under §12(2) and Rule 10b-5.

Point II: The SEC Has Not Expressed a View about Petitioners' Claims. It Should Be Invited to Submit its Views Now.

Contrary to respondents' contention (Opposition at 23), the SEC has never determined that "petitioners held no 'security' that required registration." Nor has the SEC ever indicated that the question of the enforceability of the choice-of-law and forum selection clauses in the context of this case is moot. (Opposition at 19, 20n.19, 23.) The only pronouncement by the SEC cited by respondents, an August 5, 1991 letter from the SEC's Mary Beach to Representative Pease (Opposition at RA-2-5), suggests that no such determination has been made. Ms. Beach wrote: "*if* the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by [petitioner] Mr. Roby and others, the staff may consider whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate." (emphasis added.)[3]

Despite respondents' suggestions to the contrary (*e.g.*, Opposition at 3), it is indisputable that investments in Lloyd's

---

[3] Respondents have reviewed the 1987-88 correspondence between counsel for Lloyd's and the SEC that was obtained in response to a Freedom of Information Act request. From that correspondence, initiated by Lloyd's at the time it was preparing to expand its recruitment of American investors, it appears that the proposed method of offering was not, in fact, the method used in selling Lloyd's securities to American investors. For example, Lloyd's submitted to the SEC a hypothetical sample private offering memorandum, and undertook that there would be no general solicitations of American investors. Even the limited disclosures in that sample memorandum were not made to American investors before they made their investment decisions, and there were intensive group solicitations.

syndicates are securities under the federal securities laws.[4] The Court of Appeals declined to rule on whether the investments constitute securities (Petition at 10c), noting that the SEC has provided little guidance on the issue. In Ms. Beach's letter to Representative Pease (quoted above), the SEC stated unequivocally that investments in Lloyd's syndicates are securities. (Opposition at RA-5).

In light of respondents' inaccurate portrayal of the SEC's views (formulated in a letter by a staff attorney in response to hypothetical facts and divorced from those alleged here), and in light of the irreconcilable inconsistency between the SEC's current efforts to regulate foreign issuers (Petition Appendix I-K) and the Court of Appeals' decision here, petitioners respectfully urge this Court to ask the SEC for its views in a brief *amicus curiae*.

---

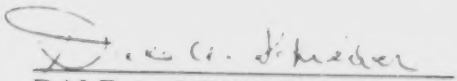
[4] Lloyd's securities are investment contracts, since each "involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946). Investors' commitment of assets to the syndicates is certainly a monetary investment under *Howey*. *See, e.g., International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 559 (1979); *Hector v. Wiens*, 533 F.2d 429, 432 (9th Cir. 1976). Because all investors who participate in a syndicate pool their funds to finance the syndicate's underwriting activities, investors' participations involve "horizontal" commonality; and because "the fortunes of investors and [syndicates] are linked so that they rise and fall together," investors' participations also involve "vertical" commonality. *Dooner v. NMI, Ltd.*, 725 F. Supp. 153, 159 (S.D.N.Y. 1989) Investors expect to derive profits solely from the efforts of others (the Active Underwriters), through "a participation in earnings resulting from the use of investors' funds...." *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
October 14, 1993

Respectfully submitted,



DALE A. SCHREIBER
Counsel of Record for
Petitioners
PROSKAUER ROSE GOETZ &
MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3475
Of Counsel

MINNA SCHRAG
STEVEN B. FEIGENBAUM
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000